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THE RIGHT TO ASSISTANCE OF COUNSEL IN MILITARY AND WAR CRIMES TRIBUNALS: AN INTERNATIONAL AND DOMESTIC LAW ANALYSIS.

Much of recent international and criminal law scholarship deals with topics such as universal jurisdiction, evolving definitions of international crimes, and the application of accountability principles developed during international tribunals such as the *ad hoc* International Criminal Tribunal for former Yugoslavia (ICTY), and the *ad hoc* International Criminal Tribunal for Rwanda (ICTR). Little scholarship has been devoted to the right to a fair trial.¹ In particular, international standards of effective defense counsel representation for accused persons, appear to have been ignored by mainstream international law scholarship. In United States jurisprudence, there is a multitude of federal and state cases dealing with the Constitution's Sixth Amendment right to counsel provision. There is also a large amount of legal scholarship regarding a defendant's rights to a fair trial in United States courts. Despite this, little attention has been paid to competency of counsel issues in a United States military commission. The United States has not prosecuted a foreign accused in a military commission since World War Two. In

¹ Black's Law Dictionary defines a fair and impartial trial as "a hearing by an impartial and disinterested tribunal; a proceeding which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial consideration of evidence and facts as a whole." The dictionary cites *Raney v. Commonwealth* for the proposition that a fair trial is "one where the accuser's legal rights are safeguarded and respected." See e.g. Sara Stapleton, *NOTE: Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and the Impermissibility of Derogation*, 31 N.Y.U. J. INT'L & POL. 535, 553 (1999), quoting, BLACKS LAW DICTIONARY, 596 6th ed. 1990. See also, *Irwin v. Dowd*, 366 U.S. 717, 728 (1961). In his concurrence, Frankfurter wrote:

More than one student of society has expressed the view that not the least significant test of the quality of a civilization is its treatment of those charged with crime, particularly with offenses which arouse the passions of a community. One of the rightful boasts of Western civilization is that the state has the burden of establishing guilt solely on the basis of the evidence produced in court and under circumstances assuring an accused all the safeguards of a fair trial.

Id., at 729 (Frankfurter J. concurring)

the aftermath of 11 September 2001, such an eventuality is likely.² While the finite rules of the military commission have yet to be set, it is clear through the grant of defense counsel to accused persons, a right to zealous representation exists.³ Likewise, little scholarship has been devoted to the rights of defendants before various international tribunals.

The dual purpose of this article is first to explore, and if possible, determine, what "international standards" exist regarding minimum levels of defense representation in international and war crimes tribunals. Included in this later category are military commissions. The second purpose is to determine whether, in the current United States military commission scheme, defense counsel are expected to provide "adequate representation" within the requirements of both domestic and international law. In light of the second purpose, this paper will analyze proposed military defense counsel representation of persons accused of committing war crimes against the United States, as well as to suggest a framework that meets both international and domestic standards. Generally, discussion of the right to effective defense counsel should be of growing importance for two reasons. First, there has been an international push toward accepting universal jurisdiction for the most heinous criminal offenses.⁴ Second, of domestic

² This proposal is found under the executive order and subsequent Department of Defense Directive (DoDD) which was created in response to the 11 September 2001 attack on the United States

³ See DoD, Military Commission Order No. 1., section 4(b)(C)(2) which reads in pertinent part: The Chief defense Counsel shall detail one or more Military Officers who are judge advocates of any United States armed force to conduct the defense for each case before a Commission ("Detailed Defense Counsel".) The duties of the detailed Defense Counsel are:

(a) To defend the Accused zealously within the bounds of the law without personal opinion as to the guilt of the Accused; and

(b) To represent the interests of the Accused in any review process as provided by the Order.

⁴ See e.g., Bruce Broomhall, *Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law*, 35 NEW ENG.L. REV. 399, 400-02, (2001); also, Luc Reydam, *International Decision: Niyonteze v. Public Prosecutor*, 96 A.J.I.L. 231 (2002). As an example of a recent exercise of universal jurisdiction, Switzerland prosecuted a former Rwandan mayor facing

importance, is that the proposed military commissions will place the tribunal system under both the potential review of the United States Supreme Court, as well as “under the “eye” of international organizations.⁵

This paper does not discuss the merits of military commissions versus civilian international or domestic courts. Nor does this paper directly address a variety of criticisms and questions regarding the composition, rules of evidence, or jurisdictional issues surrounding military tribunals. Where an issue regarding evidentiary rules, jurisdictional principles, appellate review, and tribunal composition arise in this paper, it only does so in the context of the role of the defense counsel. Finally, in many articles writers fail to note the interplay between domestic and international law. This paper recognizes that United States Constitutional Law and common law tradition have great effect on international law. However, where the term international law is discussed and analyzed, the term is narrowly construed to current practice of international tribunals and agreements, as well as the development of a customary international law.

Finally, the courts of comparison in this paper, the ICTY and ICTR are courts exercising universal jurisdiction.⁶ The contemplated military commissions are not an exercise in universal jurisdiction because the United States can be considered an injured

similar allegations as Akayesu. Niyonteze was found in Switzerland, and the Swiss government refused extradition to the ICTY and Rwandan national courts. Niyonteze was prosecuted under Swiss Military Law and sentenced to life in prison. However, on appeal, the Court d’Cassation dismissed some charges based on jurisdictional flaws and reassessed the sentence to fourteen years. See e.g. *Id.*

⁵ See e.g. Amnesty International Press Release, 22 March 2002; also, Article, “Taliban Prisoners Could Be Held for Decades,” Yahoo News; and, Article, “Military Commissions Can’t Compare to International Courts,” Human Rights Watch release, 4 December 2001.

⁶ Universal jurisdiction, defined in greater detail below, occurs where a state exercises jurisdiction over offenses to which it has no geographic, *in-personam*, or other nexus. See e.g. *James v. Illinois*, 493 U.S. 307, 320, 110 S. Ct. 648, 656, 107 L. Ed. 2d 676 (1989) (Stevens J. concurring); and, *United States v. Smith*, 680 F.2d 255, 257 (1st Cir. 1982); citing, *United States v. Pizzarusso*, 388 F.2d 8, 10-11 (2nd Cir. 1968), cert den. 392 U.S. 936, 88 S.Ct. 2306, 20 L.Ed.2d 1395 (1968). See also, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW sec 421 (1986); and, S. Kobrick, *The ex post facto Prohibition and the*

party in some, if not all, cases.⁷ Yet, there are similar elements between courts exercising universal jurisdiction and the military commissions. For instance, the defendants in all cases can be reasonably said to have committed crimes against humanity.⁸ Likewise, there is an international interest in the procedure and outcome of each trial. Moreover, the use of comparative law is helpful in determining the fairness of any proceeding. To a degree, determinations of effectiveness of counsel are conducted by comparing a questionable case to established case law.

Few scholars of international law or criminal law dispute a primary interest of a state is to prosecute criminals. It has been observed that a primary function of a criminal court is its “truth-seeking function.”⁹ However, it has also been recognized that this function does not occur without the constraints of a fair trial. Such constraints include *inter alia*, a presumption of innocence,¹⁰ notice of criminality,¹¹ formal evidentiary rules,¹² a “beyond a reasonable doubt” burden of proof,¹³ the accused’s right to an

Exercise of Universal Jurisdiction Over International Crimes, 87 COLUMB. L. REV 1515, 1524 (1987)

⁷ The Military Commissions are basically operating under the internationally recognized theories of passive personal jurisdiction, and territorial jurisdiction. See e.g. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 303 (5th ed. 1998). See also, Wade Esty, *Note: The Five Bases of Extraterritorial Jurisdiction and the Failure of the Presumption Against Territoriality*, 21 HASTINGS INT’L & COMP. L. REV 177, 182 (1997)

⁸ Crimes against humanity have been defined in a number of different instruments including the 1949 Geneva Conventions, and the Rome Statute creating the International Criminal Court.

⁹ See e.g. *Swidler & Berlin v. United States*, 524 U.S. 399, 118 S. Ct. 2081, 141 L. Ed. 2d 379 (1998); and, *James v. Illinois*, 493 U.S. 307, 311, 110 S. Ct. 648, 651, 107 L. Ed. 2d 676 (1990).

¹⁰ See e.g. ICTY Statute, Article 87(a); and, ICTR Statute, Article 87(a). Note, under Swiss Military Criminal Law, proof beyond a reasonable doubt is the lawful requisite to prove guilt. See e.g. CPM, Article 5.

¹¹ See e.g. ICC Statute, Article 22, reiterating the customary international law principle of *nullem crimen sine lege* (no criminal responsibility unless the conduct was criminal at the time it took place). Also see e.g. *Smith v. Golden*, 415 U.S. 566, 94 S. Ct. 1242, 39 L. Ed. 2d 605, (1974)

¹² See e.g. David Leonard, *Perspectives on Proposed Federal Rules of Evidence 413-414: The Federal Rules of Evidence and the Political Process*, 22 FORDHAM L. J. 305, 310 (1995). Formal evidentiary rules exist to ensure the ordered flow of justice, free of surprise, and as a buffer against unreliable evidence. Rules also exist to protect areas of privacy customarily protected in common law. See e.g. Robert J. Arujo, *International Tribunals and Rules of Evidence: The Case for Respecting and Preserving the “Priest-Penitent” privilege Under International Law*, 15 AM. U. INT’L L. J. 639 (2000). To date, the ICC, ICTR,

impartial judiciary,¹⁴ competent counsel,¹⁵ the right to face his or her accusers,¹⁶ and the right to present a complete defense.¹⁷ This article focuses on the right to effective counsel because, in theory, such counsel will ensure the presence of these other rights.

and ICTY to not *per se* recognize such privileges.

¹³ Under customary international law, the burden of proof for guilt in trial appears to be the “beyond a reasonable doubt” standard enunciated in United States courts. See e.g. ICTY, Article 87; ICTR, Article 87; and, ICC, Article 66(3). Article 66 reads as follows:

Presumption of Innocence:

(3) In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

Id.

¹⁴ For instance, the ICCPR provides:

In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

ICCPR, at Art 14(1).

See also, e.g. *Tumey v. Ohio*, 273 U.S. 510; 47 S. Ct. 437; 71 L. Ed. 749; 1927. Also see e.g., *Piersack v. Belgium*, 53 Eur. Ct. H.R. (ser. A) at P 30 (1982)[European Court of Human Rights decreeing impartial judges as essential to justice]. Also see, European Convention on Human Rights, art. 6 (1); and, Article 8(1) of the American Convention on Human Rights which provides:

Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law.

ACHR, Art 8(1)

Also see e.g. Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 DAYTON L. REV. 565, 567 (1996); and, Sam Ervin Jr., *Separation of Powers: Judicial Independence*, 35 LAW & CONTEMP. PROBS. 108, 121 (1970). Cox writes that the concept of an independent, impartial judiciary dates at least to Lord Coke’s defense of common law judges against King James I in 1603, followed by the 1701 Act of Settlement protecting judges against undue influences from the crown. See Cox, at 568-70. Finally see, Allen N. Sultan, *Autonomy under International Law*, 21 DAYTON L. REV. 585, 659 (1996). Professor Sultan surveys the Roman, Greek, Hebrew, Islamic, and Christian legal traditions and concludes that the failure to provide an impartial judiciary rises to a *ius cogens* violation. Id., at 659.

¹⁵ See e.g. Convention III Relative to the Treatment of Prisoners of War, signed at Geneva 12 August 1949, Art. 99, in DIETRICH SCHNIDLER AND JIRI TOMAN, *THE LAWS OF ARMED CONFLICTS* (1981), 355. Also see e.g. ICTR 96-4-T, at para 66.

¹⁶ See e.g. UNITED STATES CONSTITUTION, SIXTH AMEND. Also, *Lilly v. Virginia*, 527 U.S. 116, 123, 119 S. Ct. 1887, 1893, 144 L. Ed. 2d 117 (1999) holding: In all criminal prosecutions, state as well as federal, the accused has a right, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, “to be confronted with the witnesses against him.” U.S. Const., Amend. 6. See also, *Pointer v. Texas*, 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965) (applying Sixth Amendment to the States).

The Court has also held, “The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.” *Maryland v. Craig*, 497 U.S. 836, 845, 111 L. Ed. 2d 666, 110 S. Ct. 3157 (1990).

It should be noted, that United States law places a higher threshold on the government than most other jurisdictions to show the right to confront witnesses as non absolute. Exceptions have been carved out for cases involving national security and child witnesses. See e.g. *Maryland v. Craig*, supra, and *United States v. Yunis*, 867, F.2d 617 (D.C. Cir. 1989) The ICTR, ICTY, and ICC permit adult witnesses to testify anonymously or via affidavit. See e.g. ICTR-96-4-T, appeal of Akayesu

¹⁷ For a discussion on the right to present a complete defense, see e.g. *United States v. Scheffer*, 523 U.S.

Part I of this article explores the evolution of legal rights accorded to enemy combatants, both under treaty and customary international law.¹⁸ Additionally, trials of international significance, such as the post World War II International Military Tribunals (IMT) are analyzed for their impact on the right to counsel. These trials form part of the basis for current customary international law of such a right. Part II of this article addresses the meaning of "effective representation" as defined under international law. Comparisons are drawn between the International ICTY and ICTR. Particular attention in this section is paid to the ICTY case of *Prosecutor v. Dusko Tadic*,¹⁹ and the ICTR case of *Prosecutor v. Jean Paul Akayesu*.²⁰ In both *Tadic*, and *Akayesu*, several issues of attorney representation are brought before their respective trial and appeals processes. Additionally, codes of defense counsel ethics and privileges between attorney and accused are analyzed in each *ad hoc* tribunal. Part III of this article analyzes the Constitutional and common law right to effective assistance of counsel. While both the United States Constitution and common law principles bear significant impact on international understanding, separate analysis is conducted to ascertain whether the application of United States law as a guideline meets international minimum standards. In this arena, the uniqueness of military representation is covered in regard to the meaning of effective representation of counsel. It should be noted that throughout this article, particularly in the sections involving United States law, the terms effective assistance and zealous representation are nearly synonymous. Part IV reviews the existing codes of

303, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998). [holding the right is not without limits and subject to rules of evidence]

¹⁸ Customary International Law is defined as "as the unwritten body of rules or norms derived from the practice and opinion of states." See e.g. Michael Byers, *Terrorism, the Use of Force and International Law After 11 September*, 51 INT'L & COMP. L.Q. 401, 410 (2002)

ethics for military defense counsel as a guideline for ensuring effective and zealous representation. These codes are important as they establish expectations and parameters of representation. Finally, the article concludes with an assessment that in terms of military defense counsel representation, the current military commission scheme meets or surpasses both international understandings and domestic legal standards.

I. RIGHT TO COMPETENT COUNSEL UNDER INTERNATIONAL LAW

a. Recognition of right to assistance of counsel in prisoner of war and war crimes cases, from 1863 to 1949: Creating the Customary International Law Basis.

Customary International law has been defined as evolving from the common practices of states.²¹ One area of long term interest in customary international law revolves around the treatment and rights of prisoners of war. Traditionally the legal rights of enemy combatants are found in principles governing the treatment of prisoners of war. The concept of a military tribunal dates back roughly five hundred years.²² Prior to the United States Civil War, treatment accorded prisoners of war in Europe varied

¹⁹ *Prosecutor v. Tadic*, IT-94-1-T (1994) (Hereafter IT-94-T)

²⁰ *Prosecutor v. Akayesu*, ICTR 96-4-T (1998) (Hereafter IT-96-4-T)

²¹ BURNS WESTON, ET AL., *INTERNATIONAL LAW AND WORLD ORDER*, 107 (3rd Ed. 1997). Customary international law has also been described as, "uniformities in state behavior rather than formal writings." *Id.*

²² The first known attempt at establishing an international tribunal actually occurred in 1474. A trial of representative judges convicted Peter von Hagenbusch (also spelled Hagenbach), the Governor of Breisach, Austria for committing crimes against "God and man" See e.g. Joel Cavicchia, *The Prospects for an International Criminal Court in the 1990's*, 10 DICK. J. INT'L L. 223, 224 (1992). Also, see e.g. Timothy H.L. McCormack, *Conceptualizing Violence: Present and Future Developments in International Law: Panel II: Adjudication Violence: Problems Confronting International Law and Policy on War Crimes and Crimes Against Humanity: Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law*, 60 ALB. L. REV. 681 (1997). See also e.g., Daniel P. Pickard, *Comment: Security Council Resolution 808, A Step Toward a Permanent International Court For the Prosecution of International Crimes and Human Rights Violators*, 25 GOLDEN GATE U.L. REV. 435, 462 (1995). Von Hagenbusch was tried before a tribunal of twenty-eight judges from the allied states of the Holy Roman Empire. While he was not tried for crimes committed during wars, this trial is significant in that he was stripped of his knighthood by an international tribunal which found him guilty of murder, rape, perjury and other crimes against the law of God and man in the execution of a military occupation. *Id.*

from conflict to conflict, and from warring state to warring state.²³ However, there were expectations placed both on prisoners of war as well as states holding them. Interestingly, the United States Civil War provided the first codified rules dealing with rights of prisoners of war. In 1863, the Union Army was issued General Order 100, also known as the "Lieber Code," after its author Professor Francis Lieber of Columbia University.²⁴ In all, the code contained 157 articles covering conduct norms for the Union Army.²⁵ Articles 48 through 135 of this code dealt with the treatment and rights of prisoners of war. However, no specific article within this code guaranteed prisoners the right to assistance of counsel. Nonetheless, one article may be considered the basis for assuming the right to counsel at legal proceedings. Article 59 conferred jurisdiction over a prisoner for "crimes committed against the captor's army or people, committed before he was captured, and for which he had not been punished by his own authorities."²⁶ Based on several military tribunals held during and immediately after the Civil War, it might also be the case that the right to counsel before such tribunals was assumed in the United States.²⁷

²³ See e.g. Ralph M. Stein, *Artillery Lends Dignity To What Otherwise Would Be a Common Brawl*: An Essay on Post Modern Warfare and the Classification of Captured Adversaries, 14 PACE INT'L L. REV. 133, 141-42 (2002). Stein analyzes treatment of prisoners of war based on the type of conflict. For instance, during the American War of Independence, treatment of captured Continental Army personnel was exceedingly harsh because British Army officers viewed the enemy as committing treason. In preindustrial Europe, prisoners were often given parole with the promise to not take up arms again in the conflict. Id.

See also, e.g. Alan Watson, *Seventeenth Century Jurists, Roman Law, and the Law of Slavery*, 68 CHI. KENT L. REV. 1343, 1350 (1993). Watson writes that Grotius accepted that prisoners of war and their descendants could become slaves. However, this was an arbitrary practice.

²⁴ Prepared by Francis Lieber, promulgated as General Order No. 100 by President Lincoln, 24 April 1863

²⁵ The Lieber Code gave recognition to the universality of certain offenses such as rape, robbery, fraud, burglary, forgery and murder. See also, L.C. Greene, *Enforcement of Law in International and Non-International Conflicts, the Way Ahead*, 24 DENV J. INT'L L. & POL'Y 285, 296 (1995).

²⁶ General Order No. 100, supra note 12, at Article 59.

²⁷ See e.g. WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS*, 832-42 (1920). Winthrop writes, But as a general rule, and as the only quite safe and satisfactory course for rendering of justice to both parties, a military commission will—like a court martial—permit and pass upon objections interposed

It is difficult to assume, however, that in 1865, continental European laws considered a right to counsel inherent in prisoner of war cases. This is because the right to counsel did not exist in several of the central European legal systems during the middle of the 19th century.²⁸ Yet, European governments in the latter half of that century expressed increasing concern over the rights of prisoners held by combatant states.²⁹ This concern was partly a product of demographic changes in military service. With the dual advent of industrialism and the growth of empires, a dramatic increase in the size of “citizen armies” occurred.³⁰ Additionally, the Third Republic in France was a driving force in expanding the right to representation in criminal courts.³¹

In 1874, on the initiative of Czar Alexander II of Russia, delegates from fifteen European states met in conference in Brussels to discuss codifying rules of warfare.³² During this conference, a text was finalized which again dealt, in part, with prisoner's rights.³³ The text was composed of 56 Articles. Article 28 read, in part, "Prisoners of

to members, as indicated in the 88th Article of war, will formally arraign the prisoner, allow attendance of counsel, entertain special pleas if any are offered. *Id.*, at 841.

However, the quality of defense counsel during these early military commissions is not without reasoned criticism. See e.g., Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13 (1990)

²⁸ See e.g. The hon. Robert W. Sweet, *Civil Gideon & Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503, 504 (1998), citing, Earl Johnson jr. *Toward Equal Justice: Where the United States Lands Two Decades After*, 5 MD. J. CONTEMP. LEGAL ISSUES 199, 205 (1994); Justice Sweet writes that France and Germany provided a right to counsel in the 1870's.

See also, e.g. John Leubsdorf, *On the History of French legal Ethics*, 8 UNIV. CHI. SCHL. ROUNDTABLE 341(2001). Leubsdorf writes that independence from the government was an important feature of French defense counsel (*avocats*) as early as the Napoleonic era. However, the right to counsel for all persons accused of crimes did not appear under law until the Third republic after 1870.

See also, W.E. Butler, *Civil Rights in Russia*, 1, 7, in, CIVIL RIGHTS IN IMPERIAL RUSSIA (Olga Crisp & Linda Edmondson ed. 1989). Butler notes that trial by jury did not exist until granted by statute in 1864. However, it was not until the provisional government of Kerensky in 1917 that right to counsel appears.

²⁹ DIETRICH SCHNIDLER AND JIRI TOMAN, *THE LAWS OF ARMED CONFLICTS* (1981), 27

³⁰ S.E. FINER, *HISTORY OF GOVERNMENT*, VOL III (1997), 1625-1630

³¹ Sweet, *supra* note 28, at 504.

³² Schindler and Toman, *supra* note 28, at 27.

³³ *Id.*, The Final Protocol was signed on 27 August 1874 by the following states: AustriaHungary,

war are subject to the laws and regulations in force in the army whose power they are."

While Article 28 did not confer a right to counsel before a disciplinary or judicial hearing, it suggested that an accused facing such a hearing would be accorded some legal or statutory rights based on the captor state's laws. Furthermore, as a result of political changes, by 1878, several states in Western Europe recognized a right to counsel.³⁴ In 1880, the Institute of International Law, a British-based association, published a text titled, "The Laws of War on Land."³⁵ The text itself was comprised of 86 articles. Within the text, concerns were raised regarding legal rights of prisoners of war. For example, Article 62 stated "prisoners are subject to the laws and regulations in force in the army of the enemy."³⁶ As in the case of the Brussels Conference, this article did not confer a right to counsel, but suggested that should a prisoner be suspected of criminal misconduct, he would be accorded the principal rights conferred under captor state law. The importance of this text, along with the 1874 Brussels Conference was that both were incorporated into the Hague Conventions of 1899³⁷ and 1907.³⁸ However, neither of those Conventions provided specific rights to counsel for prisoners before judicial or disciplinary proceedings.

The watershed years of World War I (1914-1918) showed deficiencies in prior conventions and codes regarding conduct of war in general. Post-war concepts of international law changed dramatically as a result of the gross bloodshed in that

Belgium, Denmark, France, Germany, Great Britain, Greece, Italy, Netherlands, Portugal, Russia, Spain, Sweden and Norway, Switzerland, Turkey. *Id.*

³⁴ See e.g., Sweet, *supra* note 27, at 504

³⁵ The Laws of War on Land, in Schindler and Toman, *supra* note 28 at 35

³⁶ *Id.*, at Article 24

³⁷ See, International Convention With Respect to the Laws and Customs of War by Land (Hague I), signed at the Hague July 29, 1899

³⁸ See, International Convention Concerning the Laws and Customs of War on Land (Hague II), signed at

conflict.³⁹ Views toward treatment of prisoners of war, in particular, underwent significant changes. This change was partly due to heavily propagandized and celebrated cases such as the German execution of a British Nurse accused for spying.⁴⁰ Moreover, there were significant instances of trials in prisoner of war camps where an accused's legal rights were non-existent, even by contemporary standards.⁴¹ Credible accounts of life in German prisoner of war camps reveal that enlisted men often received brutal treatment while incarcerated.⁴² As a result of these events, national leaders and private humanitarian organizations, attempted to provide an international code of rights for prisoner of war treatment. These attempts reached fruition in 1929 in Geneva Switzerland.⁴³

The 1929 Geneva Convention first codified the right of prisoners of war to defense representation in judicial proceedings. This Convention occurred as a result of pressure applied by the International Red Cross beginning in 1921.⁴⁴ The 1929 Convention consisted of ninety-seven articles concerning the treatment of prisoners of war. It reiterated a recurring theme of combatant state jurisdiction over prisoners.⁴⁵ It

the Hague, Oct. 18, 1907,

³⁹ See e.g. Finer, *supra* note 29, at 1630-32; also see B.H. LIDDELL-HART, A HISTORY OF THE FIRST WORLD WAR (1972)

⁴⁰ At the outbreak of World War One, the German Government established a military bureau of investigation to "determine violations of the laws and customs of war which enemy military and civilian persons have committed against the Prussian troops. Nurse Edith Cavell, a British citizen, had been trapped behind German lines in Belgium, after that country's invasion. While working as a nurse she assisted stranded allied troops in making their way back to France "to fight again." She was captured and, after nine weeks in solitary confinement, confessed to this activity. After a short trial, and despite a protest from the United States legation in Brussels, she was executed by firing squad. See e.g. Green, *supra* note 22 at 305.

⁴¹ *Id.* See also, NEIL M. HEYMAN, DAILY LIFE DURING WORLD WAR I, 141 (2002)

⁴² *Id.*

⁴³ Convention Relative to the Treatment of Prisoners of War, 27 July 1929, in, Schindler and Toman, *supra* note 29 at 271

⁴⁴ *Id.*

⁴⁵ *Id.*, at Article 45. This Article reads in part, "prisoners of war shall be subject to the laws, regulations, and orders in force in the armed forces of the detaining Power...."

also provided for the establishment of military tribunals modeled on the same basis as the combatant state's tribunals.⁴⁶ However, the Convention went further than any predecessor when it stated, "no prisoner of war shall be sentenced without the opportunity to first defend himself."⁴⁷ Most important for the purposes of this paper is Article 62 which read, "The prisoner of war shall have the right to be assisted by a qualified advocate of his own choice..." That article further established a right for the "protecting power" to procure an advocate for the prisoner.⁴⁸ Moreover it placed an obligation on the "detaining power" if requested by the "protecting power," to provide a list of persons qualified to conduct the defence. [sic].⁴⁹ Article 63 provided a basic guarantee to prisoner of war, that any prisoner prosecution would mirror the existing procedure applicable to persons in the armed force of the detaining power.⁵⁰ Article further 64 guaranteed this right is through an additional right of appeal, presumably before the captor state's appellate courts⁵¹

Just as World War One provided a watershed in the evolution of international law, so too did World War Two (1939-1945). That war proved equal in its devastation to all prior wars and ill-treatment accorded both prisoners and civilians, particularly by the Axis powers, caused the issue of prisoner rights to be renewed once more.⁵² From the conclusion of hostilities until 1949 a series of discussions concerning, treatment of prisoners of war culminated in what became known as the Third Geneva Convention of 1949 (Geneva III).⁵³ Geneva III supplemented the 1929 Geneva Convention by

⁴⁶ Id., at Article 46

⁴⁷ Id., at Article 61.

⁴⁸ Id., at Article 62

⁴⁹ Id., at Article 62

⁵⁰ Id., at Article 63

⁵¹ Id., at Article 64

⁵² Schindler and Toman, *supra* note 29 at 195.

⁵³ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75

expanding, rather than abrogating, prisoner of war legal rights before judicial and tribunal hearings. These rights are found in Article 82 through Article 108. One significant clarification from the 1929 Convention dealt with trial forum. For instance, in the 1929 Convention, there was no specific rule enumerating forum. In Geneva III, Article 84 permitted a prisoner of war "to be tried before a military court, unless the detaining power's laws permit a prisoner to be tried before a civil court."⁵⁴ Likewise, in Geneva III, clarification was provided regarding the quality of defense counsel. Article 99 of Geneva III states, "...no prisoner of war may be convicted without having had an opportunity to present his defence [sic] and the assistance of a qualified advocate or counsel."⁵⁵ While it may seem that this language is taken directly from the 1929 Convention, discussion at Geneva III helped define what "qualified advocate or counsel meant."⁵⁶

Equally important in setting international standards for rights to counsel were the post-war "Nuremberg trials" of German war criminals. As the war ended, allied representatives met in London to conclude a charter detailing the "constitution, jurisdiction and functions of the International Military Tribunal (IMT), which conducted the Nuremberg trials."⁵⁷ At these trials, all accused persons were afforded defense

U.N.T.S. 135, in Schindler and Toman, *supra* note 29 at 355.

⁵⁴ Id., at Article 84

⁵⁵ Id., at Article 99

⁵⁶ See e.g. Ruth Wedgwood, *Agora, Military Commissions: Al-Qaeda, Terrorism, and Military Commissions*, 96 A.J.I.L. 328 F.N. 337 (2002).

⁵⁷ See, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and the Charter of the International Military Tribunal, Aug 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279. In the course of World War II, the Allied Governments issued several declarations concerning the punishment of war criminals. On 7 October 1942, it was announced that a United Nations War Crimes Commission would be set up for the investigation of war crimes. It was not, however, until 20 October 1943, that the actual establishment of the Commission took place. In the Moscow Declaration of 30 October 1943, the United States, United Kingdom, and Soviet Union issued a joint statement that the German war criminals should be judged and punished in the countries in which their crimes were committed, but that, "the major criminals whose offenses have no particular geographic localization," would be punished "by the joint decision of the Governments of the Allies." See, SCHINDLER & TOMAN, THE

counsel.⁵⁸ As a counterpart to the IMT in Europe, an International Military Tribunal was created in Asia to address war crimes by Japanese military officers and political leaders.⁵⁹ Again, all accused persons were afforded defense counsel. One difference between the IMT for Asia and the Nuremburg trials had to do with selection of counsel. Most of the Japanese defendants were provided military officers with legal billets (JAGS).⁶⁰ In the most salient of these cases, *In re Yamashita*, military defense counsel vigorously pursued General Yamashita's appeal to the Supreme Court.⁶¹ While, *Yamashita* does not formally create any new parameters for defense counsel in war crimes tribunals, it does create a standard for defense counsel representation. This standard, as discussed repeatedly below, is one of zealous representation through all legitimate and ethical means.

In one respect, primarily because of concerns from the lead American Prosecutor, Supreme Court Justice Robert Jackson, the concept of fairness came to the forefront of the IMT.⁶² However, even before Justice Jackson became involved in the case, rules

LAWS OF ARMED CONFLICTS, *supra* note 29 at 881.

⁵⁸ IMT, Section IV provides the right to counsel. For more detail, see f.n. 49, *infra*.

⁵⁹ The International Military Tribunal for the Far East was established by a special proclamation of General Douglas MacArthur as the Supreme Commander in the Far East for the Allied Powers. See SCHNINDLER & TOMAN, THE LAWS OF ARMED CONFLICTS, *supra* note 29 at 881.

⁶⁰ See e.g. George F. Guy, *The Defense of Yamashita*, 6 USAFA J. LEG. STUD. 215, 216-17 (1996).

⁶¹ See e.g. *Yamashita*, 327 U.S. 1, 5, 66 S. Ct. 340, 90 L. Ed. 499 (1946). The court held, "Throughout the proceedings which followed, including those before this Court, defense counsel have demonstrated their professional skill and resourcefulness and their proper zeal for the defense with which they were charged." *Id.*

⁶² Jackson's opening statement highlighted the importance of fairness before the IMT:

Before I discuss the particulars of the evidence, some general considerations which may affect the credit of this trial in the eyes of the world should be candidly faced. There is a dramatic disparity between the circumstances of the accusers and the accused that might discredit our work if we should falter in even minor matters... We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspiration to do justice.

See e.g. Stapleton, *supra* note 1 at 545.

concerning the rights of accused persons before the tribunal were promulgated.⁶³ By 1945 standards the rules reflected more of Constitutional and common law rights than those practiced in the Soviet Union.⁶⁴ In establishing procedural rules of law that involved the right to competent counsel as part of the right to a fair trial, the IMT formed a standard from which later international trials could not deviate.

The history of prisoner of war rights reveals a customary international law basis for requiring effective representation at war crimes tribunals. While there is a large corpus of domestic law from criminal trials, the addition of a customary international law analysis is important to war crimes trials and military commissions in that it provides guidance for minimum standards of representation. That some scholars may argue Sixth Amendment protections may not apply to military commissions, makes the customary international law study all the more important. This is because, the Geneva Convention (III) regarding prisoners of war is a partially self executing document.⁶⁵

⁶³ The IMT Rules regarding Fair Trial are found in Section IV of the London Charter. This section reads as follows:

Section IV: Fair Trial for Defendants

Article 16. In order to ensure a fair trial for the Defendants, the following procedure shall be followed:

- (a) The Indictment shall include full particulars specifying in detail the charges against the Defendants. A copy of the Indictment and of all the documents lodged with the Indictment, translated into a language which he understands, shall be furnished to the Defendant at a reasonable time before the trial.
 - (b) During any preliminary examination or trial of a Defendant he shall have the right to give any explanation relevant to the charges made against him.
 - (c) A preliminary examination of a Defendant and his Trial shall be conducted in, or translated into, a language which the Defendant understands.
 - (d) A Defendant shall have the right to conduct his own defense before the Tribunal or shall have the assistance of Counsel.
 - (e) A Defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defense, and to cross examine any witness called by the Prosecution.
- (828)

⁶⁴ See e.g. See Joseph E. Persico, *INFAMY ON TRIAL* 397-405 (1994)

⁶⁵ See e.g. *United States v. Noriega*, 808 F. Supp 791, 798 (S.D. Fla 1992). In *Noriega*, the District Court acknowledged the difficulty in determining the elements of a self-executing treaty. However, it held, In the case of Geneva III, however, it is inconsistent with both the language and spirit of the treaty

b. Current Views of an Accused's Basic Right to Competent Counsel Under International Law and Universal Jurisdiction: Other General Sources

While the right to competent counsel and universal jurisdiction are two different areas of study, there is a relationship between the two. As noted above, courts exercising universal jurisdiction are adjudicating the most heinous offenses. Under contemporary legal standards, defendants facing trial are entitled to competent counsel.

1. Right to Competent Counsel

The right to competent counsel under international law is essentially a subset of the right to a fair trial. While the Constitutional right to competent counsel governs in any United States criminal court, international tribunals represent a special area for review of international standards. Such a review is partly an exercise in reading the plain language of conventions and agreements. In part, a review of standards is also a study in comparative jurisprudence. This is because most tribunals consist of a prosecution of foreign defendants for offenses committed outside the territory of the prosecuting state or body. Offenses constituting war crimes, crimes against humanity, genocide, and offenses violating "the law of nations" often do not have a geographic nexus to the prosecuting state or body. However, jurisdiction is obtained because such crimes are viewed as

and with our professed support of its purpose to find that the rights established therein cannot be enforced by the individual POW in a court of law. After all, the ultimate goal of Geneva III is to ensure humane treatment of POWs-- not to create some amorphous, unenforceable code of honor among the signatory nations. "It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests."

Also, of importance, the District Court earlier viewed Article 22 of the Convention of providing a right of access to defense counsel. See *United States v. Noriega*, 746 U.S. 1506, 1527 (S.D. Fla 1990)
Id. See also, e.g. Michael McKenzie, Recent Development, Treaty Enforcement in U.S. Courts, 34 Harv. Int'l L.J. 596 (1993)

victimizing the whole of humanity.⁶⁶ Yet, there is almost global recognition that even the most heinous actors are accorded the right of a competent counsel.⁶⁷

International also law recognizes the authority of a nation to try war criminals by military commission.⁶⁸ As noted earlier, military courts have been used to try violators of laws of war since before the Civil War. However, other than Geneva III, little discussion exists regarding either the right to a fair trial and effective assistance of counsel before military tribunals. There are, however, two international understandings that bear on the general concept of a fair trial for all persons, the Universal Declaration of Human Rights (UDHR)⁶⁹ and the ICCPR.⁷⁰ Additionally, there are regional agreements, such as The American Convention on Human Rights,⁷¹ The European Charter on Human Rights,⁷²

⁶⁶ See e.g. Susan Chesterman, *An Altogether Different Order: defining the Elements of Crimes Against Humanity*, 10 DUKE J. COMP. & INT'L LAW, 307 (2000)

⁶⁷ Stapleton, *supra* note 1 at 539

⁶⁸ See e.g. Major Timothy MacDonald, *Military Commissions and Courts Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, 2002 Army Law. 19. See also, Reydams, *supra* note 82, at 235.

⁶⁹ G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948)

⁷⁰ ICCPR, *supra* note 73. The preamble of the ICCPR states the purpose of the Covenant, including the statement that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" and that "these rights derive from the inherent dignity of the human person." *Id.* For a brief summary of the history of the ICCPR, see David P. Stewart, *United States Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations*, 42 DEPAUL L. REV. 1183 (1993)

⁷¹ Nov 22, 1967, 9 I.L.M. 673.

See e.g. Article 8(2)(d) and Article 8(2)(e) which reads in full:

(d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;

(e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law. *Id.*

⁷² See Charter of Fundamental Rights of the European Union, as currently codified at 2000/C 364/01. See e.g. Article 47 which, in part, reads:

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. *Id.*

This Charter is different than the earlier 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, codified at Nov 4, 1950, 312 UNTS 221. In the European Convention, Article 6 provides the right to a fair trial. The right to counsel is enumerated at Article 6(3)(c) which reads:

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not

and the African Charter on Human and People's Rights,⁷³ all of which recognize a right to counsel as part of the right to a fair trial.⁷⁴ Of course, while these regional agreements may reflect customary international law, like the ICCPR, they have no legal effect on American courts.⁷⁵ Additionally, while neither the ICCPR, UDHR, nor the regional agreements specifically address fair trials for military prisoners, all are influential in their universality.

As noted above, the UDHR envisions a fair trial for all accused persons. While the UDHR is an aspirational document, rather than binding law, it is central to the goal of achieving universal justice.⁷⁶ Within the UDHR are two articles that directly bear on the right to a fair trial. Article 10 enumerates the right to a "fair and public hearing by an independent and impartial tribunal...of any criminal charge against him."⁷⁷ Likewise, Article 11 enumerates the right to a presumption of innocence, a prohibition against false imprisonment, as well as a protection from unjust punishment.⁷⁸

The ICCPR, on the other hand, is the primary international law guarantor of the international right to a fair trial.⁷⁹ Initially opened for state signature in 1966, it is

sufficient means to pay for legal assistance, to be given it free when the interests of justice so require. *Id.*

⁷³ Banjul Charter at 21 I.L.M. 59, 27 June 1987.

See e.g. Article 7(1)(c) which reads in full:

(c) the right to defence, including the right to be defended by counsel of his choice. *Id.*

⁷⁴ *Id.*, at Article 47. Article 47, in part, reads: Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. *Id.*

⁷⁵ See e.g. *United States v. Duarte-Acero*, 296 F.3d 1277 (11th Cir. 2002); also, *Hain v. Gibson*, 287 F.3d 1224 (10th Cir. 2002).

⁷⁶ See e.g. A Eide et al. (eds) *The Universal Declaration of Human Rights: A Commentary* (1992). The UDHR is not a treaty. It was adopted by the United Nations General Assembly as a resolution having no force of law. Its purpose, according to its preamble is to provide a "common understanding" of human rights and fundamental freedoms. Nutshell, pp 39

⁷⁷ Universal Declaration of Human Rights., at Article 10.

⁷⁸ *Id.*, at Article 11.

⁷⁹ See e.g. Stewart, *supra* note 70, at 1.

composed of 51 articles and covers a wide array of basic individual rights such as freedom of religion, liberty of movement, privacy rights, and the right to a fair trial.⁸⁰ The United States signed the ICCPR on 8 September 1992.⁸¹ Under Article 14, an accused is provided the "minimum guarantee" of the right to be tried in his own presence.⁸² Additionally the same article guarantees an accused person both the right to legal assistance and to be informed of this right.⁸³ Moreover, an accused is entitled to have legal assistance without payment where the accused is indigent.⁸⁴

2. Universal Jurisdiction

It is important to note that much of war crimes and crimes against humanity prosecution that relies on customary international law is conducted in courts exercising universal jurisdiction. Therefore, it is incumbent to gain an understanding of universal jurisdiction and defense practice in these courts. However, as noted in the introduction, United States military commissions are not courts of universal jurisdiction. The commissions do share similar features, to courts exercising universal jurisdiction.

Universal jurisdiction, occurs where a state exercises jurisdiction over offenses to which it has no geographic, *in-personam*, or other nexus.⁸⁵ Offenses targeted for universal jurisdiction typically involve war crimes, crimes against humanity, or other *jus*

⁸⁰ Id.

⁸¹ Id. Stewart notes that generally existing United States law complies with the ICCPR. Most of the individual rights and freedoms guaranteed by the United States Constitution and state constitutions are embodied in the ICCPR

⁸² Art 14(3)(d)

⁸³ Id

⁸⁴ Id

⁸⁵ See e.g. *James v. Illinois*, 493 U.S. 307, 320, 110 S. Ct. 648, 656, 107 L. Ed. 2d 676 (1989)(Stevens J. concurring);

cogens offenses.⁸⁶ Courts exercising universal jurisdiction are rare. Most national courts deny jurisdiction over crimes that have no geographic or personal nexus to them. However, where a court exercises universal jurisdiction, greater scrutiny should be given to its employment of due process (or the right to a fair trial).

Some scholars conclude universal jurisdiction fills a gap where other, more basic doctrines of jurisdiction provide no basis for national proceedings.⁸⁷ Universal jurisdiction occurs where a state exercises jurisdiction over criminal offenses regardless of whether any party to the offense, or the offense itself, has a geographic nexus to the state. Often universal jurisdiction is confused with a state's exercise of its "long arm" jurisdiction over offenders.⁸⁸ However, universal jurisdiction may be seen as an evolutionary growth of the "long-arm" jurisdictional exercise over crimes.

As World War II ended, allied representatives met in London to conclude a charter detailing the "constitution, jurisdiction and functions of the International Military Tribunal (IMT), which conducted the Nuremberg trials."⁸⁹ The concept of universal

⁸⁶ *Jus cogens* has been defined as "peremptory norms of general international law." See e.g., Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, U.N. Doc. A/Conf. 39/27, 8 I.L.M. 679, 699. The Vienna Convention describes these norms as ones "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *Id.* The Restatement (Third) of International Law provides that a state violates *jus cogens* if it "practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights." Restatement (Third) § 702.

⁸⁷ See e.g. Bruce Broomhall, *Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law*, 35 NEW ENG. L. REV 339, 400 (2001)

⁸⁸ *Id.*

⁸⁹ See, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and the Charter of the International Military Tribunal, Aug 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279. In the course of World War II, the Allied Governments issued several declarations concerning the punishment of war criminals. On 7 October 1942, it was announced that a United Nations War Crimes Commission would be set up for the investigation of war crimes. It was not, however, until 20 October 1943, that the actual establishment of the Commission took place. In the Moscow Declaration of 30

jurisdiction for certain offenses gained initial acceptance through the IMT, and the International Military Tribunals for Asia,⁹⁰ as well as the 1968 Israeli trial of Adolph Eichmann.⁹¹ Indeed, universal jurisdiction concepts developed in the Eichmann trial have been accepted by other national or state courts. For example, in the 1989 Ontario High Court of Justice case, *Regina v. Finta*,⁹² a Canadian Court accepted the principle that state courts can exercise criminal law jurisdiction "with respect to acts which occurred outside its territory."⁹³ In the field of tort law, the United States exercises universal jurisdiction for some claims, through the Alien Tort Statute.⁹⁴ These trials also added to the growing acceptance that some offenses, such as genocide, constitute crimes against humanity that can be prosecuted at any location by any recognized court

October 1943, the United States, United Kingdom, and Soviet Union issued a joint statement that the German war criminals should be judged and punished in the countries in which their crimes were committed, but that, "the major criminals whose offenses have no particular geographic localization," would be punished "by the joint decision of the Governments of the Allies." See, Schindler & Toman, *supra* note 28, at 881.

⁹⁰ *Id.* at 881. The International Military Tribunal for the Far East was established by a special proclamation of General Douglas MacArthur as the Supreme Commander in the Far East for the Allied Powers. *Id.*

See also, Henry T. King, Jr., *Universal Jurisdiction: Myths, realities, War Crimes and Crimes Against Humanity: The Nuremberg Precedent*, 35 N.E. L. REV. 281, 283 (2001). Professor King writes, "In today's world, universal jurisdiction is a vital legacy of Nuremberg. We should never forget that until Nuremberg it was only national courts that could prosecute criminals for crimes committed in that particular country. This concept was bypassed by Nuremberg when it obliterated traditional aspects of national sovereignty in its approach towards crimes against peace and war crimes and when it articulated for the first time the concept of crimes against humanity." *Id.*

⁹¹ *State of Israel v. Eichmann*, Criminal case No. 46/61, (36 I.L.R. 5 (J.M.DC 1968)). In *Eichmann*, the court recognized universal jurisdiction to prosecute an offense against the Jewish people that occurred prior to the formation of the State of Israel. The court specifically held:

The State of Israel's "right to punish," the Accused derives, in our view, from two cumulative sources: a universal source (pertaining to the whole of mankind) which vests the right to prosecute and punish crimes of this order in every state within the family of nations; and a specific or national source which gives the victim nation the right to try any who assault its existence

Id., at para. 30

⁹² 1 S.C.R. 701 (Can.)

⁹³ *Id.*, quoting the Permanent Court of International Justice in the *Steamship Lotus* (1927). "It does not, however, follow that international law prohibits a state from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a rule would only be tenable if international law contained a general prohibition in states to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory." *Id.*

⁹⁴ 28 U.S.C. 1350 et seq. Also, see e.g. *Doe v. Unocal* __ F.3d __ (9th Cir 2002); also, *Kadic v. Karadzic*,

complying with basic procedural rights.

Additionally, international instruments exist which recognize the efficacy of universal jurisdiction. For instance, the 1949 Geneva Conventions grant universal jurisdiction on the part of all nations to prosecute alleged perpetrators of “grave breeches of those conventions.”⁹⁵ The Conventions oblige a state that is not prepared to prosecute a *bona fide* crime against humanity, to hand over the suspect to another state prepared to prosecute.⁹⁶ Likewise, International Covenant on Civil and Political Rights (ICCPR)⁹⁷ appears to give some recognition of universal jurisdiction in Article 15(b).⁹⁸

Jurisdiction for *jus cogens* offenses such as war crimes has been established for the *ad hoc* international tribunals involving Yugoslavia and Rwanda, as well as the International Criminal Court. National courts, however, have increasingly taken the lead in prosecuting foreigners for international crimes committed outside of their borders.⁹⁹ Prior to 1999, several other countries exercised jurisdiction over crimes for which there was no geographic or nationality nexus. For instance, in 1991, Australia prosecuted a

70 F.3d 232 (2d Cir. 1996); and, *Filartega v. Pena Irala* 630 F.2d 876 (2d Cir 1979)

⁹⁵ See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Aug 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, Aug 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 28. See also, King, *supra* note 122, at 283

⁹⁶ *Id.*

⁹⁷ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976.

⁹⁸ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976. Article 15(b) reads as follows:

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which at the time it was committed, was criminal according to the general principles of the law recognized by the community of nations

Id.

⁹⁹ Leila Nadya Sadat, *Redefining Universal Jurisdiction*, 35 N.E. L. Rev. 241, 243 (2001), quoting Theodore Meron, *Is International law Moving Towards Criminalization*, 9 EUR. J. INT'L L. 18 (1988)

Ukrainian immigrant for crimes he committed against specific Jews during World War II.¹⁰⁰ Likewise, Belgium has asserted universal jurisdiction over war crimes and crimes against humanity.¹⁰¹ Spain has argued for jurisdiction over General Augusto Pinochet, before the British courts, based on atrocities committed during his tenure as president of Argentina.¹⁰² And, the Netherlands has attempted to obtain jurisdiction over persons accused of crimes against humanity in its former colony, Suriname.¹⁰³ Each of these states possess advanced legal systems considered to embody the procedural and substantive rights contemplated in international law, as discussed below. However, none of these states utilized a military court in their prosecution attempts.

In one instance, however, a state has utilized a military court to prosecute a civilian for war crimes. In 1999, Switzerland prosecuted a former Rwandan mayor for his role in the 1994 genocide.¹⁰⁴ In a case titled, *Prosecutor v. Niyonteze*,¹⁰⁵ the accused was prosecuted before a court consisting of five military officers, the president sitting as both

¹⁰⁰ Polyukhovich v. Commonwealth (1991), 172 C.L.R. 501 (Austl.)

¹⁰¹ See e.g. Luc Reydam, *International Decisions: Belgian Tribunal of First Instance of Brussels (Investigating Magistrate)*, November 8, 1998, 93 AM. J. INT'L L. 700, 703 (1999) (finding universal jurisdiction over crimes against humanity, under customary international law and *jus cogens*, in case involving criminal complaints against Chile's General Pinochet).

¹⁰² National Tribunal, Criminal Chamber in Plenary, Appellate no. 173/98-first section, sumario 1/98, Order, Madrid, 5 Nov. 1998 (confirming Spanish jurisdiction to try former Chilean head of state Augusto Pinochet for genocide, including torture, and terrorism committed against Spanish nationals in Chile). See e.g. Ex Parte Pinochet, Appeal, 24 March 1999.

¹⁰³ See e.g. Douglass Cassell, *Empowering United States Courts to Hear Crimes Within the Jurisdiction of the International Criminal Court*, 35 N.E. LAW REV. 421, 426 f.n. 19 (2001), citing: Court Amsterdam, Order of Nov. 20, 2000 (Bouterse case), accessible at <<http://www.rechtspraak.nl/gerechtshof/amsterdam>> (visited Feb. 17, 2001); Marlise Simons, Dutch Court Orders an Investigation of '82 Killings in Suriname, N.Y. Times, Nov. 26, 2000, at A12. The Dutch Court found jurisdiction to investigate torture leading to death, allegedly committed by former Surinamese military leader Desi Bouterse against Surinamese citizens in Suriname, based on a retrospective application of the 1989 Dutch statute implementing the Convention Against Torture.

¹⁰⁴ See e.g. Luc Reydam, *International decision: Niyonteze v. Public Prosecutor*, 96 A.J.I.L. 231, 235 (2002)

¹⁰⁵ See e.g. Niyonteze v. Public Prosecutor (Trib. militaire de cassation Apr. 27, 2001)

judge and jury member.¹⁰⁶ Switzerland's military code, developed in 1927, provided jurisdiction over war crimes for any defendant.¹⁰⁷ Thus, in Switzerland, a foreign civilian can be prosecuted before a military court, for heinous war crimes offenses.

II: RIGHT TO A FAIR TRIAL AND COMPETENT COUNSEL IN INTERNATIONAL PRACTICE

Having established that a right to counsel exists in treaties, customary international law and as historic precedent, it becomes important to analyze how this right has been recognized and implemented by judicial bodies. The international *ad hoc* tribunals are perhaps the best examples because of their universality. This is not to suggest either tribunal has unlimited jurisdiction. To the contrary, the jurisdiction is limited to subject matter, time period, and geographic region.

a. Basic Review on Implementation of Tribunals, ICTY & ICTR:

The United Nations Charter governs the implementation of universal international criminal law jurisdiction.¹⁰⁸ Chapter VII of the Charter defines what applicable response or action the United Nations will pursue in regard to "threats against, or breaches of, the

¹⁰⁶ Id. See also e.g., Reydams, *supra* note 104, at 233-34. Niyonteze was convicted of murder, incitement to commit murder, genocide, and incitement to commit genocide. He was sentenced to life in prison. However, on appeal his conviction for murder was overturned for jurisdictional reasons. After reassessment for the war crimes conviction, he sentenced to fourteen years followed by a ten year expulsion from Switzerland. Id.

¹⁰⁷ See e.g. CODE PENAL MILITAIRE, SUISSE (1927), at Article 2. Article 2 reads:
Those subject to military law are:...

9. Civilians who, in the event of armed conflict, commit violations of international law. Jurisdiction extends whether a declared war or other armed conflict is in existence. See e.g., Id., at Article 108. Moreover, jurisdiction is conferred wherever a violation of the laws or customs of war occurs. See e.g. Id., at 109.

¹⁰⁸ See e.g. Stewart, *supra* note 90 at 1

peace, as well as acts of aggression.”¹⁰⁹ Article 39 places the onus of determining whether a threat to peace and security exists.¹¹⁰ Additionally, the Security Council is charged with the role of deciding what measures "shall be taken in accordance... to maintain or restore international peace and security."¹¹¹ Since 1990, the Security Council has exercised criminal law jurisdiction in establishing two ad hoc tribunals, the ICTY and ICTR. To date, neither tribunal has run its course of prosecuting accused persons deemed to have committed crimes against humanity or other heinous offenses. The tribunals are similar in their construction. However, there are slight differences in the jurisdictional reach of each *ad hoc* tribunal.¹¹² Each has a trial chamber, a chief prosecutor, an appeals chamber, and a registry. In each, the registry is, in part, *de facto* responsible for ensuring the procedural rights of the accused. This is because each registry is tasked with maintaining a list of available defense counsel and assigning such counsel when the need arises. Although neither tribunal constitutes a "military commission," the international nature of the tribunal, coupled with its jurisdiction arising from acts of war, presents a standard to compare the proposed military commissions. Likewise, it is important to note the severity of the offenses as well as the historic background of each jurisdiction. The background history highlights the severity of the offenses against the individual accused's

¹⁰⁹ Chapter VII is titled, 'ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION.'

¹¹⁰ Article 39, UN Charter:

¹¹¹ Article 41, UN Charter

¹¹² The jurisdiction of the ICTY and ICTR is limited to crimes in the former Yugoslavia, and Rwanda and its neighboring states. ICTY Statute, supra note 2, art. 8 ("The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia..."); ICTR Statute, supra note 3, art. 7 ("The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda ... as well as to the territory of neighbouring(sic) States in respect of serious violations of international humanitarian law committed by Rwandan citizens."). The ICTR's temporal jurisdiction extends only to crimes committed during 1994. *Id.* But see ICTY Statute, supra note 2, art. 8 (temporal jurisdiction commences January 1, 1991, but no ending date given).

as well as presents the right to effective counsel in a proper context.

b. International Tribunal for Rwanda (ICTR)

Between April and July 1994 somewhere between 500,000 and over one million persons belonging to a distinct ethnic group were executed by Rwandan government forces, their intermediaries, and supporters.¹¹³ Individuals considered by the United Nations (U.N.) Security Council to be the perpetrators or main participants of this genocide were ultimately indicted, and in an ongoing process, brought to trial before an *ad hoc* tribunal specifically created to punish those offenders under international law.¹¹⁴ Understanding the historic background to the Rwandan genocide is also imperative to analyzing Akayesu's trial, both from a perspective of universal jurisdiction and due process.

Prior to 1994, Rwanda was the most densely populated country in Africa.¹¹⁵ From 1897 until 1917 most of its territory was ruled by Germany through a colonial administration.¹¹⁶ From 1917 through its eventual independence Rwanda was governed by Belgium through a mandate granted by the League of Nations.¹¹⁷ The Belgian colonial administration in its African territories such as Rwanda, promoted a descending superiority of white Europeans, and then stratified other classes accordingly.¹¹⁸ This

¹¹³ ICTR-96-4-T, para. 111.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See e.g. Robert F. van Lierop, *Report on the International Criminal Tribunal for Rwanda*, 3 HOFSTRA L. & POL'Y SYMPOSIUM 203, 207-08 (1998). van Lierop argues that German and later Belgian colonial authorities drove the distinction between Hutu and Tutsi to even further prominence. *Id.* This argument appears to have been adopted by the ICTR in several trial chamber decisions. See also, RICHARD F. NYROP ET AL., RWANDA, A COUNTY STUDY (1982), 11-13.

¹¹⁷ *Id.*

¹¹⁸ See e.g. Peter Uvin, *On counting, categorizing, and violence in Burundi and Rwanda*, 148, 149-50, in

stratification formed the basis for decades of post-colonial upheaval.¹¹⁹ The colonial administration was also responsible for repression and other human rights violations.¹²⁰ Belgian colonial authorities vested a minority indigenous ethnic group, the Tutsi, with substantial benefits which were deprived to the majority ethnicity, the Hutu.¹²¹ Indeed the authorities recognized a Tutsi monarchy, subservient to Belgian authority, but above that of any Hutu form of government.¹²² In 1956, the United Nations Trusteeship Council directed Belgium to organize elections on the basis of universal suffrage.¹²³ Essentially four political parties were largely formed on ethnic lines.¹²⁴ As a result of these elections, the Hutu gained a political majority.¹²⁵ From November 1959 until 18 October 1960, a series of ethnic -based attacks, reprisals, and counter-reprisals occurred between the Hutu's majority party and the Tutsi minority.¹²⁶ On that later date, Belgian authorities established an autonomous provisional government headed by Gregoire Kayibanda, the Hutu head of the majority Hutu party (hereafter MDR).¹²⁷ In turn, a large population of

CENSUS AND IDENTITY, THE POLITICS OF RACE, ETHNICITY, AND LANGUAGE IN NATIONAL CENSUS (Kertzer & Arel ed. 2002). The five categories of race from descending order were: Europeans, "Mulattos" referring to children of white males and African females, Asians, Tutsi (labeled as "blacks not submitted to customary chiefs"), and Hutu (labeled as "indigenous"). Id.

¹¹⁹ Id.

¹²⁰ Id.

¹²¹ ICTR -96-4-T, para. 82-84. According to evidence from a prosecution expert, Dr. Alison De Forges, the population percentages in 1930 were composed as follows: 84% Hutu, 15% Tutsi, and 1% Twa. As of 1930, every Rwandan was required to carry an identification certificate and be identified as a member of either ethnic group. Apparently this practice continued after Rwandan independence and lasted until 1994. Id.

¹²² Id.

¹²³ Id., at para. 87.

¹²⁴ Id., at para. 88. The four parties were the Parmehutu (MDR); the Union Nationale Rwandaise (UNAR) a party comprised of Tutsi "monarchists"; the Aprosoma, a predominately Hutu group, and the Rassemblement Democratique Rwandais (RADER), a combination of Hutu and Tutsi moderates. Id.

¹²⁵ Id.

¹²⁶ Id. See also, Jose Alvarez, *Crimes of State, Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 389 (1999). Also see, Uvin, *supra* note 115, at 153. Professor Uvin writes that in early 1962 more than 2000 Tutsi were killed, and the following year, more than 10,000. Over 40,000 fled Rwanda in 1963. Id.

¹²⁷ ICTR 96-4-T., at para. 88.

Tutsi, including the monarchy fled to neighboring countries.¹²⁸ These groups became known as “exiles.”¹²⁹

After Rwandan independence was declared on 1 July 1962, the MDR became the sole governing party under Kayibanda.¹³⁰ While large numbers of Tutsi fled Rwanda, some of the population remained behind.¹³¹ Moreover, some groups that had fled launched armed incursions into Rwanda destabilizing its economy.¹³² By 1973, Rwanda was wracked by internal unrest, and when coupled with the Tutsi incursions, Kayibanda's government collapsed.¹³³ His successor, General Juvenal Habyarimana achieved power by armed force and had several opposition and political leaders imprisoned and executed, including the former president.¹³⁴

In 1975 Habyarimana instituted a one-party system under his party the Mouvement revolutionnaire national pour le developpement (MRND).¹³⁵ At first, Habyarimana's government did not present itself as anti-Tutsi, but by 1980, with a continually weakening economy and internal dissension, the government became anti-Tutsi.¹³⁶ On 1 October 1990 Tutsi exiles in Uganda launched a failed attack in Rwanda.¹³⁷ The MNRD government's response to this attack included the arrest of

¹²⁸ Id. See also, Nyrop, supra note 116, at 17

¹²⁹ ICTR 96-4-T., at para 88. See also, Ogenga Otunnu, *Rwandese Refugees and Immigrants in Uganda*, 3, 5-7, in *THE PATH OF A GENOCIDE: THE RWANDA CRISIS FROM UGANDA TO ZAIRE* (HOWARD ADELMAN & ASTRI SUHRKE 1999). Some of the Tutsi exiles were employed by Idi Amin's regime in the Ugandan military and death squads. Amin actively supported the exile's incursions into Rwanda. Id., at 14-5

¹³⁰ ICTR 96-4-T., at para 88.

¹³¹ Id.

¹³² Id., at 89.

¹³³ Id.

¹³⁴ Id.

¹³⁵ Id., at para. 92

¹³⁶ Id., at para. 93. The government began systematically discriminating against Tutsi by establishing quotas in universities, government employment and services. Additionally, Hutu from Habyirama's native regions, Gisenyi and Ruhengeri were given preference.

¹³⁷ Id.

thousands of opposition members, mainly Tutsi, in Rwanda.¹³⁸ However, some internal and international pressure remained so that Habyarimana was pressured into political multi-party recognition.¹³⁹ Furthermore, his government agreed to accept political reforms.¹⁴⁰ This action did not stop Tutsi incursions into Rwanda because the government remained unwilling to accept the free return of all exiles.¹⁴¹

As a result of the government's intransigence toward the Tutsi exiles (RPF), their political organization's military wing, the Rwandan Patriotic Army (RPA) launched a large-scale attack on Rwanda on 1 October 1991.¹⁴² From that time, until a cease-fire agreement in July 1992, Tutsi exile forces and the Hutu dominated Rwandan military engaged in open warfare.¹⁴³ That cease-fire accepted the RPF into Rwandan politics, but ultimately this acceptance did not stem the RPA from continuing to attack Hutu targets.¹⁴⁴ As a result, Hutu political groups grew increasingly anti-Tutsi and drew a harder-line toward the Tutsi than Habyarimana.¹⁴⁵ Radio stations, for example transmitted anti-Tutsi propaganda.¹⁴⁶ However, a break in the fighting appeared when both parties agreed to settle disputes by signing parts of peace accords created in Arusha.¹⁴⁷ Yet, during this time, Tutsi soldiers in neighboring Burundi, executed the Hutu president of that country resulting in Habyarimana making contradictory public statements both about the peace

¹³⁸ *Id.* The Tutsi forces were joined under the aegis of a new political group, the Rwandan Patriotic Front (RPF) composed mainly of Tutsi exiles in Uganda.

¹³⁹ *Id.*

¹⁴⁰ *Id.*, See also, Alvarez, *supra* note 126, at 389

¹⁴¹ ICTR 96-4-T., at para. 95.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ See e.g. Prosecutor v. Ruggiu, No. ICTR-97-32-I (Judgment and Sentence; June 1, 2000)

¹⁴⁷ ICTR 96-4-T, para. 95.

accords and the Tutsi in general.¹⁴⁸ However, he agreed publicly to implement the Arusha peace accords.¹⁴⁹ Then, on 6 April 1994, while returning from a trip in Dar-es-Salaam, Tanzania, he and the new Burundi president were killed when their aircraft crashed in Rwanda.¹⁵⁰ Although the cause of the crash was not immediately determined, blame was quickly placed on the RPA.

On 7 April 1994, throughout parts of the country, the Presidential Guard and Hutu militia (called interhamwe) began killing Tutsi as well as moderate Hutu¹⁵¹. Some of these victims, such as the president of the Rwandan Supreme Court represented the best chance to avert genocide.¹⁵² Additionally, the Rwandan Armed Forces executed ten United Nations troops.¹⁵³ In quickly erected detention centers and in the open, a wholesale slaughter of civilians occurred on a scale unprecedented since 1945. Unlike the highly systematized "final solution" of the Nazi genocide program, the Rwandan genocide stemmed from a largely unplanned popular uprising.¹⁵⁴ In several cases,

¹⁴⁸ Id.

¹⁴⁹ Id.

¹⁵⁰ Id.

¹⁵¹ Id. See also, Alvarez, *supra* note 123, at 389. Interhamwe stands for "those who stand together." Id., citing PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES*, 93 (1989). According to Alvarez, the Interhamwe were armed by French agents. Additionally, these French agents were in control of Rwandan counterinsurgency operations.

¹⁵² ICTR 96-4-T, para. 95.

¹⁵³ Id. See Alvarez, *supra* note 16, at 390. Alvarez writes that after the execution of the ten Belgian soldiers, the U.N. peacekeeping forces abandoned Rwanda. The Security Council eventually permitted French troops into the area. However, the French were accused, with some evidence, of defending the genocide's perpetrators. Id.

¹⁵⁴ Although persecutions and murders of Jews occurred in Germany prior to its invasion of Poland in 1939, the "final solution" was designed at the Wansee conference was held on January 20, 1942, at a villa in the Berlin suburb of Wansee to coordinate the activities of German government agencies in developing Zyklon B gas, crematoria, and dedicated death camps for the "final solution." The Wansee Conference was convened by Gestapo chief and SS Commander Reinhard Heydrich, the head of the Reich Security Main Office ("RSHA"), who indicated to the conference that "in the course of this Final Solution of the European Jewish problem approximately eleven million Jews are involved"- to be worked to death or killed outright. XIII Trials of War Criminals before the Nuremberg Military Tribunals 210-19 (Nuremberg Document No. NG-2586-G), in WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH: A HISTORY OF NAZI GERMANY*, 965-66 (1990 fourth ed.)

political leaders of prefectures and towns (communes) became the local “movers and shakers” of the genocide.¹⁵⁵

1. Governing Statutes relevant to the ICTR selection of defense counsel:

The ICTR was established by the United Nations Security Council in Resolution 955 on 08 November 1994.¹⁵⁶ In Resolution 955, the Security Council concluded the situation in Rwanda "constituted a threat to international peace and security within the meaning of Chapter VII of the United Nations Charter."¹⁵⁷ As a result, it established an *ad-hoc* tribunal for prosecuting persons committing genocide, crimes against humanity, and violations of Article 3 common to the Geneva Convention and of Additional Protocol II.¹⁵⁸

¹⁵⁵ See e.g. Cecile E.M. Meijer, *The War Crimes Research Office Presents: News from the International Criminal Tribunals*, 9 Hum. Rts. Br. 30,33 (2002). In addition to Akayesu, the ICTR charged Ignace Baglishema for war crimes. He was the bourgmestre of the Mabanza commune. See Case No. ICTR 95-1A-T

¹⁵⁶ UN Document S/RES/955 of 8 November 1994.

¹⁵⁷ *Id.*

¹⁵⁸ Articles 1 through 4 read as follows:

Article 1: Competence of the International Tribunal for Rwanda The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the neighboring States between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

Article 2: Genocide

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.
2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:
 - a) killing members of the group;
 - b) Causing bodily or mental harm to members of the group;
 - c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - d) Imposing measures intended to prevent births within the group;
 - e) Forcibly transferring children of the group to another group.
3. The following acts shall be punishable:

Rules governing the ICTR were promulgated on 1 October 1994 by the Security Council. These rules are found in the Annex to Resolution 955.¹⁵⁹ The ICTR rules govern jurisdiction, trial and appellate procedure, selection and qualification of judges, recognized defenses, prosecution, organization of the ICTR, rules of evidence and procedure, and other important matters outside the scope of this paper.

For the purpose of defense counsel selection two Articles within the Rules play a

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- a) Genocide;
 - b) Conspiracy to commit genocide;
 - c) Direct and public incitement to commit genocide;
 - d) Attempt to commit genocide;
 - e) Complicity in genocide.

Article 3: Crimes against Humanity The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds:

- a) Murder;
- b) Extermination
- c) Enslavement;
- d) Deportation;
- e) Imprisonment;
- f) Torture;
- g) Rape;
- h) Persecutions on political, racial and religious grounds;
- i) Other inhumane acts.

Article 4: Violations of Article 3 common to the Geneva Convention and of Additional Protocol II The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

- a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- b) Collective punishments;
- c) Taking of hostages;
- d) Acts of terrorism;
- e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution, and any form of indecent assault;
- f) Pillage;
- g) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;
- h) Threats to commit any of the foregoing acts.

¹⁵⁹ Id

direct role: Article 16 establishes a Registry.¹⁶⁰ This Registry provides and determines available defense counsel.¹⁶¹ Article 20 lists the accused's rights. These rights include a presumption of innocence,¹⁶² equality of all persons at the tribunal,¹⁶³ and the right against forced testimony.¹⁶⁴ In terms of defense counsel, the accused is entitled "to have adequate time and facilities for the preparation of his or her defence [sic] and to communicate with counsel of his or her own choosing."¹⁶⁵ The accused is further guaranteed this right through the language, "to be tried in his or her presence, and defend himself or herself in person or through legal assistance of his or her own choosing... and to have legal assistance assigned to him or her in any such case if he or she does not have sufficient means to pay for it."¹⁶⁶

Article 2 of the Registry confers the right to counsel on any person suspected of crimes within ICTR or national court jurisdiction. Article 4 provides counsel to indigent persons, while Articles 6 through 12 provide procedural steps for defining and declaring indigence, as well as appealing an adverse finding. Article 13 governs pre-requisites for assignment of counsel. Under Article 13 any person may be assigned as counsel if the

¹⁶⁰ Article 16 reads as follows:

1. The Registry shall be responsible for the administration and servicing of the International Tribunal for Rwanda.
2. The Registry shall consist of a Registrar and other such staff as may be required.
3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the International Tribunal for Rwanda. He or she shall serve a four year term and be eligible for re-appointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations
4. The staff of the Registry shall be appointed by the Secretary General on the recommendation of the Registrar.

¹⁶¹ See, Directive on the Assignment of Defence Counsel, 9 Jan 1996.

¹⁶² Article 20(3)

¹⁶³ Article 20(1)

¹⁶⁴ Id at Article 20(4)(g)

¹⁶⁵ Article 20(4)(b)

¹⁶⁶ Article 20(4)(d)

Registrar concludes: the attorney has been admitted to practice law in a State, or is a professor of law at a university or similar institution and has at least ten years of relevant experience.¹⁶⁷ Further, the attorney must speak either French or English.¹⁶⁸ These qualifications, not found in the ICTY provide a greater, albeit still minimum, guarantee not found in the ICTY.

Finally, ethics guidance to defense counsel is found the ICTR Code of Professional Conduct for Defence Counsel [sic] (hereafter ICTR ethics code).¹⁶⁹ The ICTR ethics code was promulgated on 8 June 1998. The ICTR code is premised on the belief that counsel “must maintain high standards of professional conduct.”¹⁷⁰ It also requires counsel to “act honestly, fairly, skillfully, diligently and courageously.”¹⁷¹ The ICTR rules further acknowledge the defense counsel’s “overriding duty to defend their client’s interests, to the extent that they can do so without acting dishonestly or by improperly prejudicing the administration of justice.”¹⁷²

The ICTR ethics code is directly relevant to the dual concepts of the right to counsel and the right to a fair trial. It enumerates the scope and termination of representation,¹⁷³ the competence and independence of defense counsel,¹⁷⁴ and

¹⁶⁷ Id.

¹⁶⁸ Id.

¹⁶⁹ Code of Professional Conduct For Defence Counsel

¹⁷⁰ ICTR Code Annex, (1)

¹⁷¹ Id., at (2)

¹⁷² Id., at (3)

¹⁷³ Id., at Article 4: Article 4 reads:

- (1) Counsel must advise and represent their client until the client duly terminates Counsel’s position, or Counsel is otherwise withdrawn with the consent of the Tribunal.
- (2) When representing a client, Counsel must:
 - (a) Abide by a client’s decisions concerning the objectives of representation if not inconsistent with Counsel’s ethical duties; and,
 - (b) Consult with the client about the means by which those objectives are to be pursued.

expectations of diligence,¹⁷⁵ client communication,¹⁷⁶ and confidentiality.¹⁷⁷

Furthermore, the ICTR ethics code enumerates prohibited conflicts of interest,¹⁷⁸ candor toward the tribunal,¹⁷⁹ and duties to other witnesses.¹⁸⁰ Finally, the ICTR code cautions defense counsel against misconduct.¹⁸¹ How the ICTR rules and codes governing defense counsel worked in practice is best seen through one of the completed trials, where significant representation issues were raised on appeal.

2. Case Example: *Prosecutor v. Jean-Paul Akayesu*¹⁸²

A. Background Charges and Underlying Offenses:

During the Rwandan Genocide, Jean-Paul Akayesu served as the bourgmestre

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- (3) Counsel must not advise or assist a client to engage in conduct which Counsel knows is in breach of the Statute, the Rules, or this Code, and, where Counsel has been assigned to the client, the Directive. Id.

¹⁷⁴ Id., at Article 5: Article 5 reads:

In providing representation to a client, Counsel must:

- (a) Act with competence, dignity, skill, care, honesty, and loyalty;
- (b) Exercise independent professional judgment and render open and honest advice.
- (c) Never be influenced by improper or patently dishonest behavior on the part of a client.
- (d) Preserve their own integrity and that of the legal profession as a whole;
- (e) Never permit their independence, integrity and standards to be compromised by external pressures.

Id.

¹⁷⁵ Id. at Article 6: Article 6 reads:

Counsel must represent a client diligently in order to protect the client's best interests. Unless the representation is terminated, Counsel must carry through to conclusion all matters undertaken for a client within the scope of his legal profession.

¹⁷⁶ Id., at Article 7.

¹⁷⁷ Id., at Article 8. A Client confidence may be revealed under limited circumstances. These circumstances include client consent, voluntary disclosure to a third party, to establish a defense against a specific charge by the client against the Counsel, and to prevent further criminal activity. Id.

¹⁷⁸ Id.

¹⁷⁹ Id., at Article 9.

¹⁸⁰ Id., at Article 13.

¹⁸¹ Id., at Articles 17-18.

¹⁸² Case No. ICTR-96-4-T

(mayor) of the Taba Commune.¹⁸³ This was an appointed, rather than elected, position.¹⁸⁴

In this capacity, he was responsible for maintaining law and public order.¹⁸⁵ The trial court found that at least 2000 Tutsi's were killed between 7 April and June 1994. The trial court characterized the killings in Taba, as "openly committed and so widespread that, as bourgmestre, [Akayesu] must have known about them."¹⁸⁶ The court further held, "although he had the authority and responsibility to do so, [Akayesu] never attempted to prevent the killing of Tutsis in the commune in any way or called for assistance from regional or national authorities to quell the violence."¹⁸⁷

Akayesu's role in the charged offenses was not merely passive acquiescence. Several beatings, murders, and sexual degradations occurred at and near his place of work.¹⁸⁸ Moreover, on at least one occasion he participated in ferreting out Tutsis and suspected Tutsi sympathizers in house to house searches.¹⁸⁹ He further ordered the beatings of Tutsis to obtain intelligence and ordered the local militia to kill several others.¹⁹⁰ On 19 April 1994, he ordered the Hutu residents of Taba to kill intellectual and influential people.¹⁹¹ Based on these instructions, five secondary school teachers were hacked to death by locals wielding machetes and agricultural implements.¹⁹² On several other occasions, he personally used threats of death and torture to obtain information on

¹⁸³ Id., at para. 10

¹⁸⁴ Id.

¹⁸⁵ Id., at para. 12.

¹⁸⁶ Id.

¹⁸⁷ Id. The court further listed specific offenses which Akayesu took part in or encouraged.

¹⁸⁸ Id.

¹⁸⁹ Id.

¹⁹⁰ Id.

¹⁹¹ Id.

¹⁹² Id.

the whereabouts of Tutsi intellectuals.¹⁹³

Akayesu was originally charged under several specifications of genocide, crimes against humanity, and violations of Article 3 Common to the Geneva Conventions and of Article 4(2)(e) of Additional Protocol 2.¹⁹⁴ Within the ambit of each, he was specifically charged with murder, torture, rape, incitement to commit genocide, cruel treatment, and other inhumane acts. During trial, the prosecution was permitted to amend its indictment and add the crime of rape under the aegis of genocide and crimes against humanity.¹⁹⁵ The tribunal convicted him of genocide, direct and public incitement to commit genocide, and crimes against humanity.¹⁹⁶ At several occasions during the trial and subsequent appeals, Akayesu expressed dissatisfaction with his defense counsel.¹⁹⁷

B. The Trial and Appellate Chamber's Decisions Regarding the Right to Competent Counsel

Akayesu raised several "fair trial" issues both during trial and on appeal.

¹⁹³ Id

¹⁹⁴ ICTR 96-4-T (Sentencing): Akayesu was specifically charged as follows:

Count 1: Genocide, punishable by Article 2(3)(a)

Count 2: Complicity in Genocide, punishable by Article 2(3)(e)

Count 3: Crimes Against Humanity (extermination), punishable by Article 3(b)

Count 4: Direct and Public Incitement to Commit Genocide, punishable by Article 2(3)(c)

Count 5: Crimes Against Humanity, punishable by Article 3(a)

Count 6: Violations of Article 3 Common to the Geneva Conventions as incorporated by Article 4(a)

Count 7: Crimes Against Humanity, punishable by Article 3(a) of the Statute of the Tribunal

Count 8: Violations of Article 3 Common to the Geneva Conventions as incorporated by Article 4(a)

Count 9: Crimes Against Humanity (murder) punishable by Article 3(a) of the Statute of the Tribunal

Count 10: Violations of Article 3 Common to the Geneva Conventions as incorporated by Article 4(a).

Count 11: Crimes Against Humanity (torture) punishable by Article 3(f)

Count 12: Violations of Article 3 Common to the Geneva Conventions as incorporated by Article 4(a).

Count 13: Crimes Against Humanity (rape), punishable by Article 3(g)

Count 14: Crimes Against Humanity (other inhumane acts), punishable by Article 3(i)

Count 15: Violations of Article 3 Common to the Geneva Conventions and of Article 4(2)(e) of Additional Protocol 2 (outrages upon personal dignity, in particular rape, degrading and humiliating treatment and indecent assault). Id.

¹⁹⁵ Id

¹⁹⁶ Id

Important to the analysis in this paper was his dual claim of the tribunal denying him his choice of counsel, as well as ineffective assistance of counsel.¹⁹⁸ Initially, Akayesu argued his inability to afford a counsel. The Tribunal found Akayesu indigent, and in accordance with the Directive on Assignment of Defense Counsel, the Registrar of the Tribunal assigned a Western European attorney, Mr. Johan Scheers as his defense counsel.¹⁹⁹ However, Mr. Scheers absented himself from the tribunal due to financial disagreements with the tribunal and the Tribunal then found Scheers' unavailable.²⁰⁰ Akayesu was then appointed Michael Karnavas as his new defense counsel.²⁰¹ This substitution occurred on 31 October 1996 and it resulted in a scheduled delay of trial until 9 January 1997.²⁰² However, on 20 November 1996, Akayesu requested a further change in defense counsel.²⁰³ He specifically requested a Canadian attorney named Mr. Michael Marchand.²⁰⁴ The Tribunal denied this request and on 9 January 1997, the Registrar

¹⁹⁷ Id

¹⁹⁸ Id.

¹⁹⁹ See ICTR-96-4-T, Decision Concerning a Replacement of an Assigned Defense Counsel and Postponement of the Trial, 31 October 1996. Also see Annex B, Akayesu's Grounds of Appeal. In his second notice of appeal, Akayesu charged:

The Court and the registrar deprived the Appellant of his right to choose his Defence Counsel. He could not have his first choice, Johan Scheers because... the Registrar's Office. On 31 October 1996, Michael Karnavas, Mr. Scheers' assistant who had contacted Scheers in Belgium, illegally coerced the Appellant to "choose" him as defence Counsel in replacement of Mr. Scheers. The Appellant dropped Michael Karnavas because of his deceitful maneuvers. (sic) Moreover, it has been discovered that Karnavas had been a candidate to work as Prosecutor and that he has already written and stated that he could never defend a "genocider." Id., at A(2d)(a)

²⁰⁰ Decision Concerning a Replacement of an Assigned Defense Counsel and Postponement of the Trial, 31 October 1996.

²⁰¹ Id.

²⁰² Id.

²⁰³ Id.

²⁰⁴ Annex B, Akayesu's Grounds of Appeal. In his second notice of appeal, Akayesu complained:

Appellant's second choice was Mr. Marchand from Montreal, Canada, who was present at the opening of his trial on 9 January 1997. The prosecutor knew he was present as recognized... in the New York Times on 8 September 1998. The Court and the Registrar illegally refused requests by Mr. Marchand to address the Court and meet his client. Id., at A(2d)(a)

It appears, however, that Akayesu's arguments were contrary to the Tribunal's understanding. The Tribunal asserted it denied Mr. Marchand because Akayesu was already represented. Therefore, if Akayesu desired

appointed, over Akayesu's objection, Mr. Nicolas Tinagaye and Mr. Patrice Monthe to defend Akayesu.²⁰⁵ Akayesu then attempted to represent himself.²⁰⁶ However, the Tribunal did not permit this, and kept Tiangaye and Monthe in their capacity as his defense counsel.²⁰⁷

On appeal, Akayesu contended that in denying him his choice of counsel, the Tribunal denied him the right to a fair trial.²⁰⁸ He further complained of ineffective assistance of counsel.²⁰⁹ In response to these claims, the Appeals Chamber held that an indigent person's right to counsel of his own choosing raised an issue of balancing that right against ensuring "proper use of the Tribunal's resources."²¹⁰ Moreover, the Appellate Chamber held "in principle, the right to free legal assistance of counsel does not confer the right to counsel of one's own choosing."²¹¹ To the Appeals Chamber, the right to choose a specific counsel applies only to an accused who can afford to pay for counsel.²¹² That chamber found it compelling Akayesu was permitted to release counsel

Marchand, he would have to be represented by Marchand *pro bono*. Marchand found this requirement untenable. Moreover, at the time of Akayesu's request, Mr. Marchand's credentials could not be verified by the trial chamber. See e.g. Appellate Chamber Judgment, Akayesu's Ground of Appeal para. 51

²⁰⁵ Annex B, Akayesu's Grounds of Appeal A(2d)(a). Also see, Appellate Chamber Judgment, Akayesu's Ground of Appeal, para. 45 - para. 48.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ See e.g. see Annex B, Akayesu's Grounds of Appeal. The underlying basis for this complaint involved several factors. First, neither defense counsel contacted Mr. Scheers for his prior case-work and advice, despite the fact Akayesu gave both counsel permission. Second, the defense counsel called as an expert witness, General Romeo Dallaire, the United Nations commander who testified that a genocide had taken place. Thirdly, Akayesu alleged his defense counsel disclosed privileged statements. Fourth, Akayesu charged that his attorneys made no effort to secure expert assistance to rebut the Prosecution's main expert, Dr. Alison DeForges. Fifth, Akayesu averred his defense counsel failed to probe for bias against any of the Prosecution's witnesses. Finally, Akayesu argues that in not advising Akayesu of his right to testify, or encouraging testifying, his defense counsel were ineffective. *Id.*

²¹⁰ Appellate Chamber Judgment, Akayesu's Ground of Appeal para. 60

²¹¹ *Id.*, at para. 60

²¹² *Id.*, at para. 61. The Appeals Chamber relied on a past decision, *Prosecutor v. Kambanda*, in holding, ...in the light of textual and systematic interpretation of the provisions from the Human Rights Committee and the organs of the European Convention for the Protection of Human Rights and

on two separate occasions.²¹³ In terms of not permitting Akayesu the right to defend himself, the Appeals Chamber noted that at several occasions, "his attitude toward the [Trial] Chamber suggested otherwise."²¹⁴

In determining whether Tiangaye and Monthe were competent counsel, the Appeals Chamber noted that the ICTR standard of review is "gross incompetence."²¹⁵ As a starting point, the Appeals Chamber presumes counsel is competent.²¹⁶ This presumption places a burden of proof on the defendant. In order to establish "gross incompetence," an accused would have to demonstrate, there is "reasonable doubt as to whether a miscarriage of justice resulted."²¹⁷ In establishing this standard, the Appeals Chamber considered adopted the ICTY case, *Prosecutor v. Dusko Tadic*.²¹⁸ The standard of determining effectiveness is then a fact based determination where the Appeals Chamber appears unwilling to "second-guess" the decisions of trial defense counsel.²¹⁹ On a final note, it should appear troubling that so little due process analysis was conducted regarding Akayesu's complaints. While his appeal may be novel from the ICTR perspective, such complaints are routinely addressed, as is shown below, in United

Fundamental Freedoms, that the right to free legal assistance by counsel does not confer the right to choose one's counsel. *Id.*, citing ICTR 97-23.

²¹³ *Id.*

²¹⁴ *Id.*, at para. 65-66.

²¹⁵ *Id.*, at paras. 76-77. The Appeals Chamber noted the right to competent counsel is guaranteed under Article 14 of the ICCPR, Article 6 of the European Convention on Human Rights, and, Article 8 of the American Convention on Human Rights. *Id.*

²¹⁶ *Id.*, at para. 78.

²¹⁷ *Id.*, at para. 77.

²¹⁸ *Id.*, citing *Prosecutor v. Tadic*. In that case the ICTY Appeals Chamber held, when evidence was not called because of the advice of defence counsel in charge at the time, it cannot be right for the Appeals Chamber to admit additional evidence in such a case, even if it were to disagree with the advice given by counsel. The unity of identity between client and counsel is indispensable to the workings of the International Criminal Tribunal. If counsel acted despite the wishes of Appellant, in the absence of protest at the time, and barring special circumstances which do not appear, the latter must be taken to have acquiesced. *Id.*

²¹⁹ *Id.*

States courts. The Akayesu decision additionally gains relevance in that while, it created a minimum standard for later trials before international tribunals, military defense counsel practicing before military commissions will have formal professional responsibility rules and Sixth Amendment case-law which will likely result in a far-higher quality of representation.

c. International Tribunal for former Yugoslavia (ICTY)

1. Background Facts in Brief:

The history of the Balkan landmass in Southeast Europe has been characterized by successive invasions.²²⁰ These invasions, coupled with the region's mountainous geography, created ethnic and religious enclaves. Christians, including both Orthodox and Catholic, as well as Muslims reside in the Balkans.²²¹ Within the region formerly called Yugoslavia, ethnicities such as Serb, Croat, Bosnian, Slovene, Montenegrin, Kosovar, and Albanian resided.²²² Added to this makeup was the fact that from the fourteenth century, until the early twentieth century, Ottoman Turkey ruled much of the landmass as part of its empire.²²³ Additionally, the territory not held by the Ottomans was frequently under the control of neighboring European states.²²⁴ In 1919, Yugoslavia was formed from these ethnic enclaves into a single country.²²⁵ Serbs constituted the

²²⁰ See, Deborah L. Ungar, *COMMENT: The Tadic War Crimes Trial: The First Criminal Conviction Since Nuremberg Exposes the Need for a Permanent War Crimes Tribunal*, 20 WHITTIER L. REV. 677-683 (1999).

²²¹ See e.g. Kellee L. Fabian, *Proof & Consequences: An Analysis of the Tadic & Akayesu Trials*, 49 DEPAUL L. REV. 981, 984 (2000).

²²² Id., citing, BRANIMIR ANZULOVIC, *HEAVENLY SERBIA: FROM MYTH TO GENOCIDE* 1-2 (1999).

²²³ Fabian, *supra* note 221, at 984.

²²⁴ Id.

²²⁵ Id., at 985

most numerous, but not the majority, ethnicity.²²⁶ Prior to 1945 civil strife between ethnic groups based on territorial claims, religious differences, and nation rights claims permeated the area. During the period of Nazi occupation (1940-1945), German troops relied on Croat leaders to suppress the Serb population.²²⁷ However, after the war, pro-communist forces, under Joseph Broz Tito, gained control over Yugoslavia and prevented the country from splitting into separate ethnic-based states.²²⁸ With Tito's death in 1980, the collapse of the Soviet Union, and a rise in Serb nationalist movements, Yugoslavia began to split apart. On 25 June 1991, Croatia and Slovenia declared independence.²²⁹ The leader of Yugoslavia, Slobodan Milosevic, a Serb, ordered the army to invade Slovenia.²³⁰ After European intervention, Milosevic then turned the Serbian army toward Croatia.²³¹ In January 1992, the United Nations brokered a cease-fire between Croatia and Serbia.²³² During this time ethnically diverse Bosnia-Herzegovina (Bosnia), another Yugoslav province declared its independence.²³³ Within that province Muslims and Croats found themselves fighting Serbs.²³⁴ From 1992 until 1995, Serbian military and paramilitary groups engaged in a pattern of human rights abuses that came to be known under the umbrella label, "ethnic cleansing."²³⁵

²²⁶ Id.

²²⁷ See e.g. MICHAEL P. SHARF, BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBURG 22 (1997), (citing *Serbia's Ghosts: Why the Serbs See Themselves as the Victims, Not the Aggressors*, Newsweek, Apr. 19, 1993, at 30.) According to Sharf, over 500,000 Serbs were killed by the Croat Ustasha (pro-Nazi) movement in concentration camps. Id., at 23.

²²⁸ Fabian, *supra* note 218 at 987.

²²⁹ Id.

²³⁰ Id.

²³¹ Ungar, *supra* note 220, at 683

²³² Id.

²³³ Id.

²³⁴ Id.

²³⁵ Fabian, *supra* note 221, at 987, citing BOGDAN DENITCH, ETHNIC NATIONALISM: THE TRAGIC DEATH OF YUGOSLAVIA 7 (rev. ed. 1994). Ethnic cleansing is described as "the forcible expulsion of nondominant ethnic groups in a given canton." Id.

2. Statute:

The ICTY was established in 1993 to prosecute war crimes committed during the conflict which began with the dissolution of that country in 1991.²³⁶ Specifically, on 23 May 1993, the Security Council adopted Resolution 827 creating the ICTY.²³⁷ As in the later case of the ICTR, the *ad hoc* Yugoslavia Tribunal possessed jurisdiction over specific crimes including genocide, crimes against humanity, and offenses under common article 3 of the Geneva Convention.²³⁸ Accompanying Resolution 827 was a directive on the appointment of defense counsel.²³⁹ The ICTY directive also recognized an accused's right to counsel.²⁴⁰ This right exists whether or not the accused can afford to remunerate counsel.²⁴¹

²³⁶ U.N. Doc. S/RES/25704, annex (1993), reprinted in 32 ILM 1192 (1993)

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*, at Article 5. This article reads: Without prejudice to the right of an accused to conduct his own defence: (sic)

- i. a suspect who is to be questioned by the Prosecutor during an investigation;
- ii. an accused upon whom personal service of the indictment has been effected; and,
- iii. any person detained on the authority of the Tribunal, including any person detained in accordance with Rule 90

bis shall have the right to counsel.

²⁴¹ *Id.*, at Article 6. This article reads: Right to assigned counsel

A. Suspects or accused who lack the means to remunerate counsel shall be entitled to assignment of counsel paid for by the Tribunal

B. A suspect or accused lacks the means to remunerate counsel if he does not dispose of means, which would allow him to remunerate counsel at the rates provided for by the Directive. For the purposes of Section III of this Directive, the remuneration of counsel also includes counsel's expenses.

C. For suspects or accused who dispose of means to partially remunerate counsel, the Tribunal shall pay that portion, which the suspect or accused does not have sufficient means to pay for.

There are basic qualifications for the assignment of defense counsel. Unlike in the later ICTR directive, discussed above, however, there is no minimum experience requirement for defendants in the ICTY.²⁴² Additionally, within the directive, there is no specific guarantee of the right to competent counsel. However, discussion of this right appeared during later case proceedings.

3. Case Example: *Prosecutor v. Dusko Tadic*

A. Tadic's Role in the Ethnic Cleansing Program

Dusko Tadic is an interesting case study for several academic reasons, be these psychological or historic.²⁴³ In the legal context, his case represents the first real post World War II analysis of due process in an international tribunal. Tadic's actual role occurred in the Prijedor region of Bosnia. Serbian forces were responsible for expelling or killing over 52,000 non-Serbs during the Serb occupation of the region. It was during

²⁴² Id., at Article 14. Article 14 states in part.

(A) Any person may be assigned as counsel if the registrar is satisfied that he is admitted to the list of counsel envisaged in Rule 45(b) of the Rules. A person is eligible for admission to the list if:

- i. he is admitted to the practice of law in a State, or is a university professor of law.
- ii. he has not been found guilty in relevant disciplinary proceedings against him where he is admitted to the practice of law or a university professor, and has not been found guilty in relevant criminal proceedings against him;
- iii. he speaks one of the two working languages of the Tribunal, except if the interests of justice do not require this.
- iv. he possesses reasonable experience in criminal and/or international law;
- v. he agrees to be assigned as counsel by the Tribunal to represent any indigent suspect or accused;
- vi. he is, or is about to become, a member of an association of counsel practicing at the Tribunal.

²⁴³ See e.g. Ungar, *Tadic War Crimes Trial*, *supra* note 220 at 688. Tadic is of Bosnian ethnicity. He grew up in the chiefly Muslim town of Kozarac. Prior to the advent of Serb nationalism during the breakup of Yugoslavia, Tadic owned a pub that was financed by Muslim friends. His best friend, who he later killed at Omarska, was Muslim. When the Serbian paramilitary attacked Kozarac, Tadic identified prominent Muslims. Id.

this time that three prison camps were established: Omarska, Keraterm, and Trnopolje. At each of these camps human rights were routinely ignored as prisoners were beaten, killed, and in the case of females, raped.²⁴⁴ During this time Tadic “employed” himself at Omarska where he took part in beating and killing prisoners.²⁴⁵ In 1992, he immigrated with his family to Germany where he was later recognized.²⁴⁶

Most of Tadic’s appeal complaints dealt with the conduct of the trial. Namely, Tadic argued an “inequity of arms” between the resources of the prosecution and defense denied him a fair trial.²⁴⁷ In reviewing Tadic’s appeal, the Appeals Chamber relied on the plain language of regional agreements as well as the ICCPR. It concluded that the right to a fair trial is “central to the rule of law.”²⁴⁸ However, the Appeals chamber did not agree Tadic had been denied a fair trial.²⁴⁹ This later point is interesting because it ignored that while Tadic’s Appeal was being decided, contempt proceeding were initiated against his former lead trial defense counsel

B. Contempt Allegations Against Tadic’s Defense Counsel:

Milan Vujin represented Tadic throughout the proceedings in differing capacities. During the pretrial stages, he served Tadic as a “non-assigned co-counsel,” without formal pay.²⁵⁰ Vujin also represented Tadic as formal assigned counsel during the latter’s

²⁴⁴ Ungar, *supra* note 220, at 684.

²⁴⁵ See Tadic, Appeal, para 30.

²⁴⁶ Fabian, *supra* note 221, at 999.

²⁴⁷ See Tadic Appeal para. 30.

²⁴⁸ *Id.*, at para 43.

²⁴⁹ *Id.*

²⁵⁰ Prosecutor v. Tadic, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin (hereafter Contempt Proceeding), 31 January 2000. Pg 1.

appeal process.²⁵¹ The appeal process included further witness interviews in the RS. These interviews occurred, with Tadic present, in a Prijedor police station on March 14, 1998.²⁵² In October 1998, the prosecution filed a motion with the ICTY Appeals Chamber alleging that Vujin and Tadic intimidated witnesses.²⁵³ However, on November 4, 1998, the Appeals Chamber dismissed the prosecution's complaint for lack of evidence.²⁵⁴ After the dismissal, the prosecution received further witness complaints of intimidation. The prosecution renewed its complaint of intimidation to the Appeals Chamber who agreed to revisit its earlier determination.²⁵⁵ On November 11, 1999, the Chamber held Vujin in contempt under Rule 77 of the ICTY Rules of Evidence and Procedure.²⁵⁶

The Appeals Chamber first concluded it possessed an "inherent power" to

²⁵¹ Id.

²⁵² Id., at para. 7

²⁵³ Id., at para. 8

²⁵⁴ Id.

²⁵⁵ Id., at para. 11

²⁵⁶ Id. Rule 77 reads as follows:

(A) Any person who

- (i) being a witness before a Chamber, contumaciously refuses or fails to answer a question,
- (ii) discloses information relating to those proceedings in knowing violation of an order of a Chamber, or
- (iii) without just excuse fails to comply with an order to attend before or produce documents before a Chamber,

Commits a contempt of the tribunal.

(B) Any person who threatens, intimidates, causes injury, or offers a bribe to, or other wise interferes with, a witness who is giving, has given, or is about to give evidence in proceeding before a Chamber, or a potential witness, commits a contempt of the Tribunal.

(C) Any person who threatens, intimidates, causes injury, or offers a bribe to, or other wise seeks to coerce any other person with the intention of preventing that other person from complying with an obligation under an order of a Judge or Chamber, commits a contempt of the Tribunal.

(D) Incitement to commit, and attempts to commit, any of the acts punishable under this Rule are punishable as contempts of the Tribunal with the same penalties... (sic)

adjudicate contempt proceedings.²⁵⁷ However, it also recognized that standards of contempt are found neither in codified or customary international law.²⁵⁸ Instead, the Appeals Chamber relied on the IMT Charter of 1945 which gave that tribunal the power to deal with "any contumacy by imposing appropriate punishment, including exclusion of any Defendant or his Counsel from some or all further proceedings, but without determination of the charges."²⁵⁹ The Appeals Chamber also recognized that under common law, courts have the inherent authority to adjudicate and determine contempt. Based on a finding of contempt against Vujin, the Appeals Chamber fined him DfL 15,000 and directed the registrar to consider striking him from the list of acceptable defense counsel.²⁶⁰

On appeal, Tadic challenged the competency of Vujin as his defense counsel as part of his overall right to a fair trial.²⁶¹ In doing so, he asked the Appeals Chamber for leave to amend his appeal.²⁶² The Appeals Chamber, in turn, denied Tadic leave to do so, ignoring due process considerations, such as the right to conflict-free counsel.²⁶³ However, on 5 October 2001, Tadic further motioned the Appeals Chamber for reconsideration of its decision regarding the competency of Vujin.²⁶⁴ He specifically argued Vujin's behavior leading to contempt, were contrary to his interest in securing a fair trial.²⁶⁵ One of Tadic's stronger arguments basically centered Vujin *de facto* freezing

²⁵⁷ Id., at paras. 12-13.

²⁵⁸ Id., at 14.

²⁵⁹ Id., citing IMT Charter

²⁶⁰ Vujin, at para. 174.

²⁶¹ Tadic Appeal., at para. 21.

²⁶² Id.

²⁶³ Id.

²⁶⁴ IT-94-1-R, Decision on Motion for Review 30 July 2002. (hereafter DMR)

²⁶⁵ DMR at paras. 8-9.

witness testimony to the detriment of his defense.²⁶⁶

On 30 July 2002, the Appeals Chamber ruled against Tadic.²⁶⁷ The Appeals Chamber analyzed his arguments under the ICTY new evidence rule, instead of the right to conflict free counsel.²⁶⁸ The Appeals Chamber noted in the contempt proceeding, the Chamber held, Vujin had acted against the interests of his client.²⁶⁹ However, it did not apply Vujin's conduct to the whole of the Tadic trial.²⁷⁰ Instead, the Appeals Chamber held, Tadic was aware of Vujin's activities during the period he was represented by Vujin.²⁷¹ Additionally, Tadic was represented at times by four other lawyers.²⁷² In this vein, the Appeals Chamber held, "it may be reasonably inferred that the four lawyers who assisted Tadic during trial could adequately protect his interests and conduct further investigations counter-balancing the initial conduct of Vujin."²⁷³ Thus the Appeals Chamber sidestepped a basic due process rights analysis. The Appeals Chamber did not, in detail, investigate how deeply Vujin contaminated Tadic's defense. Nor did the Appeals Chamber address the fundamental right of conflict free counsel. The Chamber barely conducted a "harmless error" analysis prevalent in United States trials. In essence, the Appeals Chamber had the opportunity to further define due process under

²⁶⁶ Id., at para 6-7. Also DMR, at para. 43.

²⁶⁷ Id.,

²⁶⁸ DMR at para. 19. ICTY Rule 119 governs requests for review and states:

Where a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals Chamber, and could not have been discovered through the exercise of due diligence, the defence or, within one year after the final judgment has been pronounced, the Prosecutor, may make a motion to that Chamber for review of the judgment. If, at the time of the request for review, any of the Judges who constituted the original Chamber are no longer Judges of the Tribunal, the President shall appoint a Judge or Judges in their place.

²⁶⁹ DMR, at para. 54.

²⁷⁰ Id.

²⁷¹ Id.

²⁷² Id., at para. 55. The four other lawyers were Mr. Wladmiroff, Mr. Orie, Mr. Kay, and Mr. De Bertodano. Id

²⁷³ Id.

international law and failed to do so.

III: The Right to Effective Assistance of Counsel in United States and Common Law: Reexamination of the Right to a Fair Trial

Any analysis of due process applications to military commissions must first begin with a recognition that defense counsel are guided, in part, within the evolving framework of domestic law. While rules for professional responsibility are discussed in another section, the framework of the effective assistance of counsel is rooted in the Sixth Amendment right to counsel as well as a part of the overall concept of a fair trial. To understand the legal expectations on defense counsel before the tribunal, it is essential to review these expectations through the federal and military domestic legal system. In large part, these two systems coexist as a mirror of each other.²⁷⁴ This is particularly true where effective assistance of counsel is reviewed. Unlike in the international system, however, the federal and then later, military courts came to guarantee effective assistance counsel through a lengthy historic process.

a. Brief Note on the History of the Right to Counsel in the United States and Common Law:

In the 17th Century, criminal trials did not constitute a case in the modern sense. Rather, as one legal historian notes, a criminal trial was akin to "a race between the King

²⁷⁴ Over time, the court-martial has come to substantively mirror the federal criminal court system. See e.g. *United States v. Smith*, 27 M.J. 242 (CMA 1988). There are, however, specific rights of military members not found in state and federal courts, such as the legal protection against unlawful command influence. See e.g. *Weiss v. United States*, 510 U.S. 163, 114 S. Ct. 752, 127 L. Ed. 2d 1 (1994); also, *Curry v. Secretary of the Army*, 595 F.2d 873, 879 (1979); and, *United States v. Stoneyman*, 57 M.J. 35 (2002), reaffirming unlawful command influence as "the mortal enemy of military justice"

and the prisoner with the King having a long start and the prisoner heavily weighted."²⁷⁵ Prosecutors were not employees of the crown, but instead representatives of a private party, usually the victim.²⁷⁶ Both the accused and jurors were able to cross-examine prosecution witnesses.²⁷⁷ However, an accused faced impediments to ensuring a fair trial. For instance, often the defendant was not informed of the specific charges.²⁷⁸ Additionally, there existed no right to obtain witnesses or other evidence.²⁷⁹ In misdemeanor and trespass cases, an accused was entitled to counsel provided he or she could pay for one.²⁸⁰ For the most serious of offenses such as murder and treason, a defendant was prohibited from employing a lawyer to assist in his defense.²⁸¹ This common-law rule remained until the middle of the 18th Century.²⁸²

During the early part of the 18th Century, the position of prosecutor evolved from private entity to crown employee.²⁸³ Thus it might be seen that the ability to retain defense counsel for all persons accused, regardless of the severity of crime, became a

²⁷⁵ JAMES J. TOMKOVICZ, *THE RIGHT TO THE ASSISTANCE OF COUNSEL: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION*, 2, QUOTING 1 STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND*, 397.

²⁷⁶ TOMKOVICZ, *supra* note 275 at 3, quoting John H. Langbein, "The origins of Public Prosecution at Common Law," 17 AM J. LEG. HIST. (1973) 313, 316-17.

²⁷⁷ TOMKOVICZ, *supra* note 275 at 3.

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.* Tomkovicz notes that "self preservation was the core reason that the [crown] denied counsel to those accused of the most serious crimes... Serious crimes and treason were prominent among the perils that jeopardized the very existence of the state." *Id.* He also notes that legal jurists argued the common law prohibition represented a view that felony trials were "sufficiently simple for an accused- at least an innocent accused - to cope with by himself." *Id.* quoting, THEODORE F. PLUKNETT, *A CONCISE HISTORY OF THE COMMON LAW*, 4TH ED. 410 (1948).

²⁸² TOMKOVICZ, *supra* note 275 at 3. However, note the Treason Act of 1695 stated in part:

nothing is more just and reasonable, than that persons prosecuted for high treason and misprision of treason, whereby their liberties, lives, honour, estates, blood, and posterity of the subjects, may be lost and destroyed, should be justly and equally tried, and ... should not be debarred of all just and equal means for defence of their innocencies in such cases (sic)

Cited in *id.*, at 6.

²⁸³ See e.g. TOMKOVICZ, *supra* note 275, at 5.

matter of fairness. Additionally, William Blackstone 1723-1780, one of the most prominent jurists in western legal history, criticized the prohibition against defense counsel for heinous offenses.²⁸⁴ One result of both the evolution of the prosecutor, from private representative to public office, and Blackstone, English courts departed from the common-law prohibition against defense counsel. In such a system, the development of custom created new law.²⁸⁵ However, no uniform rules for the role of defense counsel or expectations of zealous representation emerged during this period. Yet, it may be the case that the attorney client relationship was already cemented into common law, and criminal trials adopted this practice.²⁸⁶ The most significant feature of defense counsel representation occurred in the 1747 Act of Parliament which provided the right to defense counsel representation for high treason cases.²⁸⁷

By the time the thirteen colonies gained independence, there was, on both sides of the Atlantic, movement toward permitting defense counsel in all criminal cases.²⁸⁸ Moreover, even prior to independence, there appeared a greater use of defense counsel in criminal trials.²⁸⁹ Thus, by the time the Sixth Amendment was drafted into the Constitution, the former colonies fully departed from the older common law based prohibition. Yet, it was not until the twentieth century that the right to counsel was given to mean an absolute right extending to indigents at both state and federal trials.

²⁸⁴ Id., at 6.

²⁸⁵ Id.

²⁸⁶ See e.g. Kastenber & Thompson, *The Attorney-Client Privilege: Practical Military Applications of a Professional Core Value*, 49 A.F. L. REV. 1, 3.

²⁸⁷ Id., at 8. citing 20 George II, c. 30 (1747).

²⁸⁸ Id.

²⁸⁹ Id., at 12. Noting the colonial legislatures of both Rhode Island and South Carolina acknowledged the right of defense counsel as early as 1731.

b. Trials in United States Civilian and Military Courts: A Basic Overview of the Right to Counsel and Effective Assistance of Counsel:

The right of an accused to a fair trial is rooted in the Sixth Amendment.²⁹⁰

Likewise domestic United States Law recognizes a constitutional right to counsel at all federal criminal trials.²⁹¹ Whether the Sixth Amendment directly applies to military commissions is, at present, debatable. Yet, the Sixth Amendment's shadow will influence the conduct of representation of defense counsel before the commissions.

In the landmark 1963, case, *Gideon v. Wainwright*,²⁹² the Court extended this right to all state felony trials.²⁹³ In 1972, the Court extended the right to counsel in all criminal trials.²⁹⁴ The right to counsel is recognized under military law as well.²⁹⁵ In part, this right is recognized because military trials have evolved into a "mirror" of federal criminal trials.²⁹⁶ In all trials, a knowing and intelligent waiver of this right may permit an accused to proceed under pro se representation. The standard of "knowing and intelligent" is primarily designed to protect an ill-informed or mentally deficient accused - albeit not to the point of inability to stand trial - from waiving what is now accepted as a

²⁹⁰ *Johnson v. Zerbst*, 304 U.S. 458, 82 L.Ed. 1461, 58 S.Ct. 1019 (1938). In *Zerbst*, the Supreme Court held:

The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not "still be done." It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experience and learned counsel. *Id.*, at 304 U.S. 458, 462-63, 82 L.Ed. 1461, 58 S.Ct. 1019.

²⁹¹ *Id.*

²⁹² 372 U.S. 335, 9 L.Ed.2d 799, 83 S.Ct. 792 (1963).

²⁹³ *Id.* The Court specifically held, "In our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.*

²⁹⁴ *Argersinger v. Hamlin*, 407 U.S. 25, 32 L.Ed.2d 530, 92 S.Ct. 2006 (1972)

²⁹⁵ See e.g. *United States v. Wattenbarger*, 21 M.J. 41 (CMA 1985), citing *United States v. Adams*, 45 CMR 175 (CMA 1972). Also see, *United States v. More*, 16 CMR 56, 60 (CMA 1954). See also, Thompson and Kastenberg, *supra* note 286, at 1-6.

²⁹⁶ *Id.*

fundamental right.²⁹⁷ However, the right to counsel is generally a courtroom right and does not extend into the pretrial investigation stages.²⁹⁸ The chief exception to this general rule involves interrogations and other occasionally, questioning.²⁹⁹

The right to counsel, does not confer a right to “choice of counsel.” In *Powell v. Alabama*,³⁰⁰ the Court held an accused, has the right of “a fair opportunity to secure counsel of his own choice.”³⁰¹ However, this right may recede if the scheduling of cases becomes unduly disrupted.³⁰² A more common exception to the choice of counsel rule occurs as a result of conflict of interest issues.³⁰³ Additionally, the right to choice of counsel is significantly less, when the counsel is court appointed for reasons of the accused’s indigency. In *Caplin & Dysdale v. United States*,³⁰⁴ the Court held, “those who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts.”³⁰⁵ This ruling does not mean an accused is completely barred from requesting termination of one court-

²⁹⁷ See e.g. *Zerbst*, 304 U.S. at 464. Also see e.g., *Rastrom v. Robbins*, 319 F. Supp 1090 (D. Me 1970), aff’d 440 F.2d 1251; also, *United States ex. rel. Pugach v. Mancusi*, 310 F. Supp. 691 (SDNY 1970), aff’d 441 F.2d 1073 (2d Cir. 1971).

²⁹⁸ See e.g., *Schneekloth v. Bustamonte*, 412 U.S. 218, 36 L.Ed.2d 854, 93 S.Ct. 2041 (1973). In *Schneekloth*, the Court held police were not required to apprise a suspect of his Fourth Amendment rights prior to conducting a lawful search. *Id.* Also see e.g., *Gilbert v. California*, 388 U.S. 263, 18 L.Ed.2d 1178, 87 S.Ct. 1951 (1967). *Id.* In *Gilbert*, the Court held an accused does not have the right to have counsel present during the taking of handwriting exemplars. *Id.* Also see e.g., *Schmerber v. California*, 384 U.S. 757, 16 L.Ed. 2d 908, 86 S.Ct. 1826 (1966). In *Schmerber*, the Court held that a police extraction of an accused’s blood sample does not require the presence of counsel. *Id.* Likewise, the federal appellate and district courts are replete with cases indicating a suspect does not enjoy the right to counsel during fingerprinting. See e.g. *United States v. Terry*, 702 F.2d 299, (2d Cir. 1983); also, *Woods v. United States*, 397 F.2d 156 (9th Cir. 1968); also, *Pearson v. United States*, 389 F.2d 684 (5th Cir. 1968); and, *United States v. Whitfield*, 378 F. Supp. 184 (E.D. Pa. 1974)

²⁹⁹ See e.g. *Miranda v. Arizona*, 384 U.S. 436, 472 (1966); and *Rhode Island v. Innis*, 446 U.S. 291, 64 L.Ed.2d 297, 100 S.Ct. 1682 (1980).

³⁰⁰ 287 U.S. 45, 77 L.Ed. 158, 53 S.Ct. 55 (1932)

³⁰¹ 287 U.S. at 53

³⁰² See e.g. *Downing v. Le Britton*, 550 F.2d 689 (1st Cir. 1977).

³⁰³ See e.g. *United States v. Moscony*, 927 F.2d 742 (3d Cir. 1991).

³⁰⁴ 491 U.S. 617, 105 L.Ed.2d 528, 109 S.Ct. 2646 (1989).

³⁰⁵ 491 U.S. at 624.

appointed counsel for another.³⁰⁶ However, the accused must point to a specific reason for dissatisfaction such as ineffective representation.

Included in the right to counsel, is the right to effective assistance of counsel.³⁰⁷ As in the case of international law, determining effectiveness of counsel is problematic because such a determination usually occurs after trial at some level of appeal. However, in the 1984 case, *Strickland v. Washington*,³⁰⁸ the Court articulated the Sixth Amendment-based standard for effective assistance of counsel. To establish reversible error, an accused must prove:

First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.³⁰⁹

The same day, *Strickland* was decided, the Court also held in *United States v. Cronin*³¹⁰ that while factors relevant to determining effectiveness are important, effectiveness can only be determined on a case-by-case basis.³¹¹ Common arguments for

³⁰⁶ See e.g. *Holloway v. Arkansas*, 435 U.S. 475 (1979); also, *Gandy v. Alabama*, 569 F.2d 1318 (5th Cir. 1978); and, *United States v. Montoya*, 13 M.J. 268 (CMA 1982).

³⁰⁷ *McMann v. Richardson*, 379 U.S. 759, 771, 25 L.Ed.2d 763, 90 S.Ct. 1441 (1970).

³⁰⁸ 466 U.S. 688, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984)

³⁰⁹ *Strickland*, 466 U.S. at 688.

³¹⁰ 466 U.S. 648, 80 L.Ed.2d 657, 104 S.Ct. 2039 (1984). For a good analytic discussion of both *Strickland*, and *Cronin*, see e.g. Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex-Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 1, 276-78.

³¹¹ *Cronin*, 466 U.S. at 668. The government charged Cronin with a mail fraud. His court appointed attorney was a young real-estate lawyer who had no criminal law experience. Additionally, the attorney had only twenty-five days to prepare for trial. The prosecution, on the other hand, had over four years of investigation against Cronin. On appeal, the Tenth Circuit Court of Appeals reversed Cronin's conviction. However, the Supreme Court unanimously reversed the lower court. *Id.*

ineffective representation include a lack of preparation time, opportunity for client-counsel interaction, deficient performance of counsel, and unqualified defense counsel.³¹²

c. Military defense counsel in contemplated military commissions

Just as the United States Constitution vests the authority to create military commissions in the President, rules for defense representation are promulgated by his office.³¹³ To date, the executive office has not created special regulations governing zealous representation, but the commission order envisions effective representation. While it may be the case specialized ethics rules are drawn for this order, the current system appears, from a due process standpoint, better suited to protect the rights of accused Taliban and al-Qaeida defendants, than either the ICTR and ICTY. Indeed, military case law alone has a rich trove of parameters. So too, do the ethics rule appear to surpass the ICTY and ICTR.

Military attorneys are fully qualified attorneys who are members of a civilian bar.³¹⁴ They are also officers in the armed forces.³¹⁵ There are specific provisions, upheld in case law, to ensure the quality of defense counsel.³¹⁶ For instance, “attorneys” admitted to a bar other than the fifty states or Puerto Rico are unlikely to be permitted to

³¹² See generally, JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF AN ACCUSED THIRD ED. Sec. pp 8-67 – 8-114.

³¹³ Major Timothy MacDonald, *supra* note 67, at 19.

³¹⁴ Uniform Code of Military Justice (UCMJ) Article 27(b). This article reads:

Trial or defense counsel detailed for a general court-martial-
(1) must be a judge advocate who is a graduate of an accredited law school or is a member of the bar of a Federal court, or of the highest court of a State; and
(2) must be certified as competent to perform such duties by the Judge Advocate General of the armed force of which he is a member.

³¹⁵ *Id.*

³¹⁶ Article 38(b) governs the practice of civilian counsel before military courts. Upon request, an accused may seek civilian representation at his own expense. *Id.*

practice before a military court.³¹⁷ One of the salient features as to the extent of military representation rests in Colonel Winthrop's, book, *Military Rules and Precedents* where he appears to state that persons accused before a military commission will have the same counsel rights as those before a court-martial.³¹⁸ While some scholars will undoubtedly argue that Winthrop is of limited value, it should be noted his work continues to be quoted as guidance in court cases today.³¹⁹ Thus, it may be fairly argued that persons before a military commission are entitled to the same guaranteed legal representation as a service member facing court-martial.

There is a constitutional duty to provide effective assistance of counsel in both civilian and military case law.³²⁰ A number of cases detail failures constituting ineffective assistance of counsel. For example, in *United States v. Zuis*,³²¹ the Army Court of Military Appeals found that a failure to communicate with an accused constituted ineffective assistance of counsel.³²² Likewise, a failure to research the law,³²³ and, raise timely suppression motions have been held to constitute ineffective

³¹⁷ See e.g. *In re Application of Skewes*, 52 M.J. 562 (AFCCA). In *Skewes*, the Air Force Court of Criminal Appeals upheld a trial judge's ruling to prohibit representation by an attorney whose qualifications included attending a non-accredited school and being admitted to the Hoopa Indian Tribal Bar. The Court specifically held:

This Court, like all courts, has a legitimate interest in assuring the competency of those who practice before it. We may require "high standards of qualification" before admitting an applicant to the bar, provided the qualification has "a rational connection with the applicant's fitness or capacity to practice law."

Id., citing, *Schwartz v. Board of Bar Examiners of New Mexico*, 353 U.S. 232, 239 (1957).

³¹⁸ WINTHROP, *supra* note 27, at 841.

³¹⁹ See e.g. *Weiss v. United States*, 510 U.S. 163, 114 S. Ct. 752, 127 L. Ed. 2d 1 (1994), holding that the appointment of military judges does not violate due process. Also see, eg. *Solorio v. United States*, 483 U.S. 435, 107 S. Ct. 2924, 97 L. Ed. 2d 364 (1987), upholding court-martial jurisdiction based on service membership; and, *Parker v. Levy*, 417 U.S. 733, 94 S. Ct. 2547, 41 L. Ed. 2d 439 (1974), upholding the constitutionality of conduct unbecoming an officer as a criminal offense.

³²⁰ See e.g. *Powell v. Alabama*, 287 U.S. 45 (1932); also *United States v. Scott*, 24 M.J. 186, 187 (CMA 1987). In *Scott*, the Court of Military Appeals adopted the effectiveness test in *Strickland*.

³²¹ 49 CMR 150 (ACMR 1974).

³²² *Id.*

³²³ See e.g. *United States v. Rivas*, 3 M.J. 282, 287 (CMA 1997)

assistance.³²⁴ The failure to call witnesses has, for a long while, been a source of ineffective assistance of counsel.³²⁵ Moreover, flawed trial tactics on the part of the defense, have resulted in cases being overturned.³²⁶ Finally, providing inadequate advice to an accused has constituted ineffective assistance of counsel.³²⁷ The requirement of zealous and effective representation exists in the appellate process as well.³²⁸

IV: Formal Rules of Professional Responsibility

As noted in the introduction, a study and analysis of the rules for professional responsibility are important to the concept of a fair trial. Just as United States and common law issues of counsel effectiveness help define representation of accused persons before military commissions, so too do the rules for professional responsibility. These rules establish a corpus of guidance, beyond that found for individual defense counsel before the ICTY and ICTR.

The right to effective assistance of counsel is problematic in that ineffective counsel issues are usually discovered after conviction and the imposition of sentence. Determinations of effectiveness are conducted on a case by case basis.³²⁹ However, rules

³²⁴ See e.g. *United States v. Travels*, 47 M.J. 83 (CAAF 1997); also, *United States v. King*, 30 M.J. 59 (1986).

³²⁵ See e.g. *United States v. Saintau*, 56 M.J. 888 (ACCA 2002); also, *United States v. Sadler*, 16 M.J. 982 (ACMR 1983)

³²⁶ *Rivas*, 3 M.J. at 287.

³²⁷ See e.g. *United States v. Hancock*, 49 CMR 830 (ACMR 1975); and, *United States v. Kelly*, 32 M.J. 813 (NMCMR 1991). *Kelly* represents an interesting issue because the court found defense counsel inadequate for permitting his client to enter into a guilty plea where the only evidence was an uncorroborated confession. *Id.* But see, *United States v. Lee*, 52 M.J. 51, 53 (CAAF 1999), holding, the key to effective advocacy need be determined on a case by case basis. *Id.*

³²⁸ *United States v. Grostefon*, 12 M.J. 431 (CMA 1982).

³²⁹ *United States v. Lee* 52 M.J. at 53.

for professional responsibility, provide guidance for ensuring compliance with fair trial standards. This is because the requirement of zealous representation is largely rooted in the Sixth Amendment right to counsel.

Military defense counsel have a unique role.³³⁰ Unlike their civilian counterparts, they are subject not only to the ethical rules applicable to all attorneys, but also to military law and regulations.³³¹ They are ultimately supervised by the very same agency responsible for the prosecution of military crimes.³³² In addition, they represent clients around the world and are routinely deployed to remote locations such as Bosnia, Kosovo, and Afghanistan.³³³ Thus, in addition to litigation experience before courts-martial and other forum, some military counsel are familiar with topics of international law and war crimes.

Each service branch promulgates ethics rules. These rules are largely based on the American Bar Association's (ABA) Model Rules.³³⁴ The Army ethics rules are found in the Department of the Army, regulation 27-26 (hereafter Army rules).³³⁵ The Air Force Rules for professional responsibility are found in a document titled, "The Judge Advocate General, Letter No. 92-26" (Hereafter TJAG Policy Letter 26).³³⁶ Finally, the Department of the Navy, covering both Naval and Marine Corps attorneys, has its ethics rules in a

³³⁰ Lt Col. R. Peter Masterson, *The Defense Function: The Role of the U.S. Army Trial Defense Service*, 2001 ARMY LAW 1

³³¹ *Id.*

³³² *Id.*

³³³ See e.g., *Id.*

³³⁴ See, ABA MODEL RULES OF PROFESSIONAL CONDUCT (1983) [hereinafter MODEL RULES]. In August 1983, the ABA adopted the MODEL RULES to replace the ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980) [hereinafter MODEL CODE] as the official code of ethics for the ABA.

³³⁵ See, DEP'T OF ARMY, REG. 27-26, LEGAL SERVICES: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS (1 May 1992)

³³⁶ See, OFFICE OF THE JUDGE ADVOCATE GENERAL LETTER NO. 92-26, AIR FORCE RULES OF PROFESSIONAL RESPONSIBILITY (22 Oct. 1992)

document titled, "Navy Judge Advocate General Instruction 5803.1A, Professional Conduct of Attorneys Practicing Under the Supervision of the Judge Advocate General" (hereafter Navy Rules).³³⁷ On rare occasion a service rule of professional responsibility conflicts with a state bar rule. Where this occurs, the service rule takes precedence.³³⁸ These rules not only apply to active duty military defense counsel, but also reservists and civilian defense counsel practicing before a military court.³³⁹

Each service branch requires defense counsel to zealously represent a client before courts-martial or administrative proceedings.³⁴⁰ Within the scope of representation, there is a further requirement of diligence.³⁴¹ Diligence includes fully investigating the case.³⁴² Investigation envisions client communication,³⁴³ avoiding conflicts of interest,³⁴⁴ and prompt action to preserve rights afforded to the accused.³⁴⁵ This latter category may mean informing law enforcement representatives that all further communication regarding investigative and other trial matters may be addressed only to the defense counsel.³⁴⁶

There are ethical parameters to investigating and preparing for a case. For instance, defense counsel may not knowingly use illegal means to obtain evidence or encourage others to do so. Likewise, defense counsel are not permitted to discourage

³³⁷ See, NAVY JUDGE ADVOCATE GENERAL INSTRUCTION 5803.1A, PROFESSIONAL CONDUCT OF ATTORNEYS PRACTICING UNDER THE SUPERVISION OF THE JUDGE ADVOCATE GENERAL (1992)

³³⁸ See e.g. TJAG Policy Letter 26, Rule 8.5. See also AFI 51-201, *Administration of Military Justice*, P1.3 (3 October 1997) (making the *Air Force Rules and Standards* applicable to all Air Force attorneys).

³³⁹ See, TJAG Policy Letter 26, introduction

³⁴⁰ See, TJAG Policy Letter 26, Standard 4-4.1; also, Navy Rule 1.3; and, Army Rule 1.3

³⁴¹ See, TJAG Policy Letter 26, Standard 4-4.1; also, Navy Rule 1.3; and, Army Rule 1.3

³⁴² See, TJAG Policy Letter 26, Standard 4-4.1; also, Navy Rule 1.3; and, Army Rule 1.3

³⁴³ See, TJAG Policy Letter 26, Standard 4-3.1; also, Navy Rule 1.4; and, Army Rule 1.4

³⁴⁴ See, TJAG Policy Letter 26, Standard 4-3.5. See also, *United States v. Breese*, 11 M.J. 17 (CMA 1981); also, Navy Rule 1.7; and, Army Rule 1.6

³⁴⁵ See, TJAG Policy Letter, Standard 4-3.6; also, Navy Rule 1.2; and, Army Rule 1.2

³⁴⁶ See, TJAG Policy Letter, Standard 4-3.6; also, Navy Rule 3.4; and, Army Rule 1.6

perspective witnesses from communicating with trial counsel.³⁴⁷ Because of the possibility that a witness may alter testimony from what the defense counsel recollects occurred in an interview, the ethics rules encourage the presence of a third party.³⁴⁸ This is to prevent a defense counsel from becoming a witness during trial.³⁴⁹ Where expert witnesses are employed, the service branch rules contemplate respect for the independence of the expert.³⁵⁰ The ethics rules mandate compliance with discovery requirements.³⁵¹ Moreover, defense counsel are required to present all matters to opposing counsel and the tribunal with truth and candor.³⁵²

In terms of representing the client, the various service ethics rules recognize that a defense counsel's foremost loyalty is to his or her client. This includes forthrightly advising the client of all matters of relevant law and possible courses for the trial.³⁵³ While the accused has the right to decide whether to testify, which pleas to enter, and which forum to proceed, the defense counsel, after consultation with the accused, determines which witnesses to call, how to conduct cross-examination, and what pretrial motions should be argued.³⁵⁴ It is considered unprofessional conduct, to intentionally overstate or understate risks or case prospects to a client, in an effort to exert undue influence on the client's plea decisions.³⁵⁵ Moreover, defense counsel must advise the client to avoid making extrajudicial statements or communicate with prospective

³⁴⁷ See TJAG Policy Letter 26, Standard 4-4.3; also, Navy Rule 3.7; and, Army Rule 3.4

³⁴⁸ See TJAG Policy Letter 26, Standard 4-4.4; also, Navy Rule 3.7; and, Army Rule 3.4

³⁴⁹ See TJAG Policy Letter 26, Standard 4-4.5; also, Navy Rule 3.4; and, Army Rule 4.4

³⁵⁰ See TJAG Policy Letter 26, Standard 4-4.4; also, Navy Rule 3.3; and, Army Rule 3.3

³⁵¹ See TJAG Policy Letter 26, Standard 4-4.5; also, Navy Rule 3.4; and, Army Rule 3.4

³⁵² See TJAG Policy Letter 26, Standard 4-4.5; also, Navy Rule 3.3; and, Army Rule 3.4

³⁵³ See TJAG Policy Letter 26, Standard 4-5.1(a); also, Navy Rule 1.4; and, Army Rule 1.4

³⁵⁴ See TJAG Policy Letter 26, Standard 4-5.2; also, Navy Rule 1.4; and Army Rule 1.4

³⁵⁵ See TJAG Policy Letter, Standard 4-5.1(b); also, Navy Rule 1.2; and, Army Rule 1.2

witnesses.³⁵⁶ Additionally, defense counsel should advise the client to avoid contact with prospective court-members.³⁵⁷ It is often the case that clients will make inconsistent statements, or their efforts to self-investigate the case will be viewed as motivated by a desire to obstruct justice. It is for this reason, that the defense counsel must diligently listen to the client's input, and investigate all leads.³⁵⁸

Often defense counsel discuss with prosecutors or law enforcement personnel regarding the status of discovery, witnesses, or scheduling matters. Because the perception of an accused is important, it is essential that defense counsel keep their client apprised of these discussions.³⁵⁹

Once at trial, defense counsel are subject to the same basic rules of ethics that bind prosecutors. For instance, an opening statement should only refer to known evidence.³⁶⁰ Counsel are not permitted to make misrepresentations of fact to the tribunal.³⁶¹ Likewise, counsel are forbidden from knowingly presenting false evidence or making frivolous objections.³⁶² Witnesses are to be accorded a measure of respect, without seeking to humiliate or intimidate the witness.³⁶³ Moreover, it is often unprofessional conduct to call a witness, when counsel knows the witness will assert a

³⁵⁶ See TJAG Policy Letter, Standard 4-5.1(c); also, Navy Rule 3.6; and, Army Rule 3.6

³⁵⁷ See TJAG Policy Letter, Standard 4-5.1(c); also, Navy Rule 3.5; and Army Rule 3.5

³⁵⁸ See e.g., *United States v. Polk*, 32 M.J. 150, 152 (CMA 1991). In *Polk*, the accused alleged his defense counsel failed to interview prospective exculpatory witnesses. The Court of Military Appeals remanded the case for further fact-finding on this issue. But see, *United States v. Grigoruk*, 56 M.J. 304, 307 (CAAF 2002). In *Grigoruk*, the Court of Appeals for the Armed Forces held it was not deficient performance to avoid having an expert testify. *Id.*

³⁵⁹ See, TJAG Policy Letter, Standard 4-6.2(a); also, Navy Rule 3.3; and, Army Rule 3.3

³⁶⁰ See, TJAG Policy Letter, standard 4-7.4; also, Navy Rule 3.4; and, Army Rule 3.4

³⁶¹ See, TJAG Policy Letter, standard 4-7.4 (opening statement); also, TJAG Policy Letter, Standard 4-7.8 (closing argument); also Navy Rule 3.4; and, Army Rule 3.4

³⁶² See e.g., *United States v. Pattin*, 50 M.J. 637 (ACCA 1999)

³⁶³ See, TJAG Policy Letter, Standard 4-6.6; and, Army Rule 3.4

testimonial privilege.³⁶⁴

One of the perceived difficulties in client representation occurs when a large quantum of facts clearly indicates an accused's guilt and the accused states his or her intention to testify.³⁶⁵ This situation does not only happen where an accused notifies his or her defense counsel of his or her intent to lie on the stand.³⁶⁶ There are times where a defense counsel is aware of potential client perjury without the client's outright disclosure.³⁶⁷ In such situations, the defense counsel is required to dissuade the client from testifying.³⁶⁸ Where dissuasion fails, the counsel should not take part in questioning the client on direct examination.³⁶⁹ However, a mere suspicion of potential perjury does not preclude participation in direct examination.³⁷⁰ Moreover, a defense counsel may seek to withdraw from the representation.³⁷¹ Where withdrawal is not feasible, defense counsel are advised to place, in the record of trial, evidence of their effort to dissuade their client from testifying.³⁷² It should be noted that there is no set means by which to place a record of dissuasion in the record of trial. It may be the best practice to place as an *in camera* appellate exhibit, evidence of attempts to dissuade the client from testifying. This is because where a defense counsel learns of the client committing perjury, there is a

³⁶⁴ See, TJAG Policy Standard 4-7.6(c); and Army Rule 3.4

³⁶⁵ See e.g. Lt Col. R. Peter Masterson, *supra* note 328, at 1,6. Also, see e.g. Lt. Col. Thomas G. Bowe, *Limiting the Defense Counsel's Obligation to Disclose Client Perjury After Revealed Adjournment, When Should the Conclusion of Proceedings Occur*, 1993 ARMY LAW 27, 29.

³⁶⁶ See e.g. *USALSA Reports: The Advocate for Military Defense Counsel*: DAD Notes, 1987 ARMY LAW 34, 35.; See also, *United States v. Roberts*, 20 M.J. 689, 691 (ACMR 1989). For additional reading general, see e.g., Terrence F. McCarthy & Kathy Morris Mehjia, *The Perjurious Client Question, Putting Criminal Defense Lawyers Between a Rock and a Hard Place*, 75 J. L. & CRIMINOLOGY 1197 (1984)

³⁶⁷ See e.g., *USALSA Reports*, *supra* note 364, at 35.

³⁶⁸ See, TJAG Policy Standard 4-7.7(a); and Army Rule 3.3

³⁶⁹ See, *USALSA Reports*, *supra* note 335, at 35.

³⁷⁰ See e.g. also, *Nix v. Whiteside*, 475 U.S. 157, 191, 106 S.Ct. 988, 1006 (1986) [the most honest witness may recall (or sincerely believe he recalls) details that he previously overlooked].

³⁷¹ See, TJAG Policy Letter, Standard 4-7.7(b); also, Navy Rule 3.3; and, Army Rule 3.3

³⁷² See, TJAG Policy Letter, Standard 4-7.7(c); also, Navy Rule 3.3; and, Army Rule 3.3

duty to *ex parte* disclose to the military judge.³⁷³

In cases where the accused and the defense counsel cannot cooperate in the construction and presentation of the accused's defense, there are remedies for withdrawal. For instance, in *United States v. Brownfield*,³⁷⁴ the Court of Appeals for the Armed Forces recognized, "many times, defense counsel are called upon to represent clients with whom they have a personality conflict. In these cases, there are two choices: (1) try to resolve the conflict and press forward with full and zealous representation, or (2) seek relief from the obligation to represent the client."³⁷⁵

Defense counsel have an ongoing duty to represent their client's interests after conviction. This includes all matters in sentencing, as well as in advising the client as to appeal rights.³⁷⁶ Counsel representing an accused on appeal have an obligation to investigate and present all meritorious arguments.³⁷⁷ This includes researching and arguing ineffective counsel issues related to the defense counsel's performance at trial.³⁷⁸

The professional responsibility rules governing defense counsel conduct are comprehensive. These rules provide two guarantees. The first guarantee is to the client, in that persons charged with criminal offenses will receive a defense counsel's zealous and diligent best efforts. The second guarantee is to the integrity and fairness of the proceedings. The rules ensure that accused persons will be represented diligently and ethically within the parameters of professional conduct.

³⁷³ See, TJAG Policy Letter, Standard 4-7-7(d); also, Navy Rule 3.3; and, Army Rule 3.3

³⁷⁴ 52 M.J. 40 (CAAF 1999)

³⁷⁵ *Id.*, at 44.

³⁷⁶ See, TJAG Policy Letter, Standard 4-8.1 (sentencing); TJAG Policy Letter, Standard 4-8.2 (advice on appeal)

CONCLUSION

While no military commission has yet commenced, it is likely one will begin in the near future. It is proper to understand the uniqueness of defense representation before a commission. Part of this understanding can be accomplished by a review of developing customary international law and treaty agreements. Likewise, a comparative study and analysis of the closest international law counterparts, the *ad hoc* tribunals, are important to define fair trial guarantees. These courts of universal jurisdiction present a basis by which to judge fair trial standards of military commissions. Should *Akayesu* or *Tadic* have been reviewed before a service appellate court, it is likely both cases would have been reversed on the basis of ineffective assistance of counsel. In the case of *Akayesu*, it is apparent counsel were occasionally absent from the proceedings and were likely not permitted adequate time to prepare for so large a case. Additionally, *Akayesu's* counsel employed the questionable tactic of calling an adverse witness as an expert. *Tadic*, is actually an easier case to argue for reversal. Clearly his counsel failed to act in his best interests. Additionally, at some point, his counsel, Vujin became a conflicted counsel in the most literal sense. It is a basic premise in both federal and military law that an accused is entitled to conflict-free counsel.³⁷⁹ While is true the jurisdictional basis of the ICTR and ICTY are different from military commission, these forum are the closest existing counterpart to the commission process for comparison.

In the absence of special rules for defense counsel before tribunals, the prudent

³⁷⁷ See, TJAG Policy Letter, Standard 4-8.4; also, Navy Rule 1.2; and, Army Rule 1.2

³⁷⁸ See, TJAG Policy Letter, Standard 4-8.6; also, Navy Rule 1.2; and, Army Rule 1.2

³⁷⁹ See e.g., *Cuyler v. Sullivan*, 446 U.S. 340, 345 (1980); also, *United States v. Murphy*, 50 M.J. 4, 10

course is to incorporate tenets of effective representation from United States and military law. These tenets are rooted in Sixth Amendment case law, and the rules for professional responsibility each service branch promulgated, based on the ABA model rules. Indeed, no new rules are required. Within federal and military case law, and the rules for professional responsibility, there is a far more developed and tested set of parameters than found in the international tribunals. While this article touched on only a few cases, a myriad of guidance in case law exists not only at the federal, but also the state courts. Therefore, the suggested framework for representation is to, following the guidance of Colonel Winthrop, adopt no new special measures. Military representation and its attendant standards of effective assistance of counsel surpass any current international tribunal counterpart for courts-martial. Indeed, the former category, in its infancy, appears to constitute a lessening of standards for zealous representation. However, the ICTR and ICTY should, at a minimum, set a standard by which to judge military defense counsel by. The mechanisms for assuring military defense counsel provide not only competent, but diligent and zealous representation, for accused persons before military commissions comport with international fair trial standards. There should be no reason to alter these rules. It only remains to be seen whether military defense counsel, and indeed all parties before the commissions, individually uphold and enforce these standards.